COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2016-P-0362

ESSEX, SS.

COMMONWEALTH,
Appellant

V.

JOSE L. ARIAS,
Appellee

ON INTERLOCUTORY APPEAL FROM AN ORDER
OF THE ESSEX SUPERIOR COURT

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH

FOR THE COMMONWEALTH:

JONATHAN W. BLODGETT
DISTRICT ATTORNEY
FOR THE EASTERN DISTRICT

RONALD DEROSA
ASSISTANT DISTRICT ATTORNEY
Ten Federal Street
Salem, Massachusetts 01970
(978) 745-6610 ext. 5020
BBO No. 658915
ronald.derosa@state.ma.us

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ISSUE PRESENTED

Police officers responded to a 911 call from a woman reporting that she had just seen men enter a four-unit building in an area where a "rash" of home invasions had taken place and that one of the men "racked" a handgun just before entering. After the police surrounded the house, a man came from inside onto a back porch only to immediately run back inside, even though the police told him to "show his hands." Believing a home invasion was in progress, police entered without a warrant, encountering evidence of drug trafficking in plain view during a sweep, which they subsequently seized pursuant to a warrant.

Whether the allowance of the defendant's motion to suppress was error as police had both probable cause to believe a crime was occurring and exigent circumstances or, alternatively, because the entry was permitted under the emergency aid doctrine.

STATEMENT OF THE CASE[1]

This is the Commonwealth's interlocutory appeal of a Superior Court judge's allowance of a motion to suppress evidence based on her ruling that a warrantless entry into a multi-family dwelling was not justified by either 1)) probable cause and exigent circumstances or 2)) the emergency aid doctrine. The ruling was erroneous as the police had ample reason to believe that a crime was occurring and people inside the dwelling were in danger, justifying the warrantless entry into the apartment under either warrant exception.

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[1] Record references are as follows: record appendix (R.A. _); and suppression hearing transcript (M. _).

On April 14, 2014, an Essex County Grand Jury indicted the defendant, Jose L. Arias, for trafficking in 200 grams or more of heroin (G.L. c. 94C, § 32E (c)), trafficking in 18 grams or more but less than 36 grams of cocaine (G.L. c. 94C, § 32E (b)), and furnishing a false name after being arrested[2] (G.L. 268, § 34A) (No. 1477CR00455) (R.A. 1). Having been deported on June 3, 2014, he was not arraigned until April 27, 2015, after he re-entered the United States (R.A. 1).

The defendant filed a motion to suppress evidence on May 18, 2015 and an evidentiary hearing was held on October 26, 2015 (Rup, J.) (R.A. 3-4). The judge issued a Memorandum of Decision allowing the defendant's motion on December 3; it was docketed on December 10 (R.A. 3-4).

The Commonwealth filed a motion to file a late notice of appeal on January 5, 2016, which was allowed by the court on January 12 (R.A. 4). A Single Justice of the Supreme Judicial Court for Suffolk County (Hines, J.) allowed the application on February 2,

[2] Three co-defendants were also indicted; for various reasons those cases are not before the Court.

2016 and sent the appeal to this Court (R.A. 5). The case was entered here on March 15, 2016.

STATEMENT OF FACTS[3]

I. The alleged crime: Police are called to a four-unit apartment building for a report of someone entering after "racking" a semi-automatic handgun; inside an apartment, they discover evidence of drug trafficking.

On the "night"[4] of March 5, 2014, Lawrence Police received a 911 call[5] from a woman calling from her residence on 21 Royal Street in Lawrence (R.A. 15). She told the dispatcher that while she was walking down the street to her home, she had "just seen" "two guys with a gun" on the front stoop of 7 Royal Street (R.A. 12, 15). She said she heard one of the men "load the gun," before the three entered 7 Royal Street; she "really freaked out" (R.A. 13, 16). She also told the dispatcher that "there's always a little

[3] The facts come from the judge's findings of fact (R.A. 15-20), supplemented by the "uncontroverted" testimony and evidence at the suppression hearing. Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007).

[4] No precise time of the call was adduced but the officers were working the 5 p.m. to 1 a.m. shift (M. 48).

[5] Both a recording of the 911 call, and a transcript of the call, were entered as exhibits at the suppression hearing by agreement; both are included in the record appendix (R.A. 11-14, 30; M. 80-81).

movement in that building" and she was "not really sure what [was] going on" (R.A. 13).

She provided descriptions of the men: "they" were light-skinned "Spanish," one "had a hat on" and had a "jacket and a coat, [or rather] a sweater[6] on"; one man wore a grey coat; "the other" one was black (R.A. 12-13, 15, 30). She noted that when she turned to look at the men, when she heard the gun being loaded, she "kn[e]w one of the guys looked at [her]" and she told the police that she did not want any "problem[s]" to arise for having called them (R.A. 13). When the dispatcher asked if she had seen the men before or knew what they looked like, she replied that she did not but added that she was new to the area (R.A. 13, 16). Later on during the incident, the dispatcher called the 911 caller back, using the number identified by the 911 system (M. 51-52).

Around that "time frame," there had been a "rash" of home invasions in the "area"; they were being carried out by a "crew" from New York, according to police investigation[7] (R.A. 16, M. 15).

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[6] The "sweater" was left out of the 911 transcript but can be heard on the 911 recording (R.A. 12, 30).

[7] The judge credited the testimony regarding the home invasions but found no evidence was adduced as to "how

Multiple officers responded to 7 Royal Street, which turned out to be 5-7 Royal Street (R.A. 16). They discovered it was a four-unit apartment building with one common front entry door; two units were on the first floor (5A and 7A) and two units were on the second floor (5B and 7B); when facing the building, No. 5 was on the right side and No. 7 was on the left side[8] (R.A. 9, 16). Police knocked on the door to number 5A and got no response (M. 77-78)

Sergeant Joseph Cerullo was one of the officers that responded to the scene (M. 9). He was dressed in full uniform and wore a blue "reflective jacket" emblazoned with the words Lawrence Police and a badge on the front (M. 9). Upon arrival, he went to the rear of the building along with other officers to set up a perimeter with other officers who were stationed

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recently or where these home invasions occurred or if any occurred in the immediate vicinity or neighbor[hood] of Royal Street" (R.A. 16). This finding was erroneous inasmuch as Lawrence Police Sergeant Joseph Cerullo testified that break-ins had occurred "[a]round this area, around this time frame" (M. 15). The judge also found that the caller, from whom the police later received more details, told the police she was aware of "recent armed robberies" and that she was new to the area (R.A. 18).

[8] A photograph of the front of the building was entered in evidence.

in front (M. 13-15). He noted two doors at the rear of the building (M. 16).

While stationed at the back of the building, Sgt. Cerullo saw a male with facial hair, "wearing a black and gray sweater," exit the first-floor rear door on the left, i.e., No. 5A, "quickly and with purpose," onto a back landing (R.A. 9, 17; M. 18). The sergeant shouted he was a Lawrence police officer and told the man, later identified as the defendant, to show his hands (R.A. 17; M. 17). The defendant "appeared shocked" and ran back through the same door, closing it behind him (R.A. 17; M. 17). Sergeant Cerullo tried to follow, but the door was locked (R.A. 17; M. 17).

Meanwhile, Sergeant Michael Simard, who was stationed in the front of the building, spoke to the residents of 7A Royal Street; they described the layout of the building "as far as what door leads to where," but said they did not know who lived in 5A (R.A. 17; M. 18, 53-54). They seemed "very afraid" and Sgt. Simard got the impression that "they didn't want anything to do with [the] conversation"; based on their demeanor, he inferred that "they knew who lived next door," but did not want to say anything out of

fear of reprisal (M. 76). He acknowledged that their fear was also probably partly explained by the fifteen or so police officers who were present with weapons drawn (R.A. 17; M. 69).

Sergeant Simard got the telephone number of the 911 caller from the dispatcher and called her back to see if he could get further details (R.A. 17; M. 55). The caller answered and said she lived "at an angle across from 5-7 Royal Street" (R.A. 18). She explained that she had seen three males, whom she did not recognize, on the front step of the building and that she heard "the very distinct sound of a rack being pulled back" on a "semi-automatic" pistol, a sound with which she said she was familiar with from personal experience (R.A. 18; M. 57). She also said that the men entered the building "easily" so she believed they had a key (R.A. 18; M. 57). Her observations were made "directly from very close by" (M. 58). She called the police because she was aware of the recent "armed robberies" in the area and she "thought it was some sort of robbery" (R.A. 18; M. 57, 63). She was "very nervous" and "wanted to get off the phone as soon as possible" (R.A. 18; M. 57).

At that point, Sgts. Cerullo and Simard discussed whether to call for the SWAT team[9] but decided against it as "the exigency was too much to wait for the SWAT team to come" (R.A. 17; M. 19-20). Police decided to forcibly enter Apartment 5A out of concern that any people inside the building were in danger (R.A. 18; M. 59). Five to eight minutes after police first arrived, they entered the apartment through the front door and conducted a protective sweep, finding no one there (R.A. 19; M. 21-22, 59). During the protective sweep, they saw narcotics, a scale and "thousands" of plastic baggies on the floor in plain view (R.A. 19). They also saw "jackets" "strewn on the couch of a very scarcely furnished apartment" (M. 60). They seized nothing at the time (R.A. 19).

Sergeant Cerullo made his way to the back of the apartment and confirmed that the back door to the apartment was the one through which he saw the defendant exit and reenter (R.A. 20; M. 22-23). Near that back door, the police found an interior back stairway leading up to the second floor and down to the basement; the door to the basement was open and a light was on, so they checked it (R.A. 19-20; M. 23).

[9] Sergeant Cerullo was a SWAT team member (M. 19).

There, they found three men, including the defendant, hiding in a storage area (R.A. 20; M. 24-25).

The police subsequently applied for and executed a search warrant for No. 5A and seized the heroin and cocaine now at issue, along with other indicia of drug distribution (R.A. 20).

II. The motion to suppress

A. The motion

The defendant moved to suppress the evidence seized, claiming it was a warrantless entry conducted "without any exigency and without probable cause" (R.A. 6).

B. The hearing[10]

The Commonwealth called Sgts. Cerullo and Simard at the motion hearing; they testified as above at pp. 3-9. The defendant argued that the "the officers jumped to [the conclusion there was a home invasion in progress] in order to explain their reasoning for breaking in the door" (M. 89). The prosecutor responded that the entry was justified under either

[10] The hearing was a joint one with co-defendant Alexandra Rios (No. 1477CR00458). The suppression order also applied to her case. The Commonwealth did not file for interlocutory appeal in her case.

the exigent circumstances or emergency aid exceptions to the warrant requirement (M. 95-100).

C. The ruling

The judge ruled that the entry was not justified under either exception (R.A. 15-29). In her view, the 911 caller's report of hearing "one of the men 'rack' a gun before entering the building, without more, does not support a finding that probable cause existed to believe that the men she saw had committed or were committing a crime" (R.A. 23). She also pointed out that "the only significant corroboration" of the caller's report was Sgt. Cerullo's observation of the defendant exiting and "retreating" back into the apartment (R.A. 24). In sum, she ruled:

> [v]iewed objectively, the facts and circumstances confronting the officers were insufficient to establish probable cause to believe that they were facing a home invasion, hostage situation or injured or endangered persons inside, or that the lives of the officers or others might be endangered in the absence of immediate entry

(R.A. 25).

ARGUMENT

I. THE MOTION TO SUPPRESS SHOULD HAVE BEEN DENIED BECAUSE THE WARRANTLESS ENTRY WAS JUSTIFIED AS THE POLICE HAD BOTH PROBABLE CAUSE TO BELIEVE A CRIME WAS IN PROGRESS AND EXIGENT CIRCUMSTANCES BASED ON THE FEAR THAT OCCUPANTS OF THE APARTMENT WERE IN DANGER.[11]

"The role of a peace officer includes preventing violence and restoring order . . . ." Commonwealth v. Samuel, 80 Mass. App. Ct. 560, 564 (2011), quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006). It is inarguable that society demands that police interfere when they have reason to believe a violent crime is in progress. Here, the judge failed to recognize the importance of this role of the police when she ruled that they unlawfully entered the apartment. She failed to give appropriate weight to the ominous nature of the circumstances the police encountered: they were responding to a 911 call from a "very nervous" woman who had just seen one of three men "rack" a handgun before all three entered an apartment building on a residential street in Lawrence, in an area where there had recently been a "rash" of home invasions. Plainly, under these alarming circumstances, the police had a reasonable

[11] As for the emergency aid exception, see pp. 29-33, below.

belief that the three men had entered the apartment with a plan to harm others. As such, the initial warrantless entry was lawful under the probable cause/exigent circumstances exception to the warrant requirement.

"Given the high value that our Federal and Massachusetts Constitutions assign to the warrant requirement, particularly in relation to a dwelling, [the Court] impose[s] a heavy burden on the Commonwealth to justify every warrantless search: in the absence of consent, the Commonwealth must prove both probable cause to enter the dwelling and the existence of exigent circumstances." Commonwealth v. Tyree, 455 Mass. 676, 684 (2010). "In justifying action under th[e] [exigent circumstances] doctrine, the Commonwealth has the burden of showing . . . that 'the authorities had a reasonable ground to believe that an emergency existed, and . . . [that] the actions were reasonable under the circumstances.'" Samuel, 80 Mass. App. Ct. at 563, quoting Commonwealth v. DiMarzio, 52 Mass. App. Ct. 746, 750 (2002).

A. Probable Cause

"[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the

knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense. The test is an objective one. The officers must have entertained rationally more than a suspicion of criminal involvement, something definite and substantial, but not a prima facie case of the commission of a crime, let alone a case beyond a reasonable doubt." Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992) (citations and quotations omitted). "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Commonwealth v. Cast, 407 Mass. 891, 895 (1990), quoting Draper v. United States, 358 U.S. 307, 313 (1959).

The judge erroneously determined that the police lacked probable cause to believe that the men were committing a crime and that the circumstances were not sufficiently exigent (R.A. 20-29). The judge seemed to determine that the caller met the well-known

Aguilar/Spinelli[12] basis of knowledge and reliability tests (R.A. 22-23). She erred, however, when she determined that the officers' reliable first-hand information did not provide sufficient probable cause to believe the men were committing a crime (R.A. 23: "the 911 caller's report that she heard one of the men 'rack' a gun before entering the building, without more, does not support a finding that probable cause existed to believe that the men she saw had committed or were committing a crime").

An identifiable, hence reliable, witness personally saw three men enter an apartment building,[13] one of whom racked a handgun, i.e., chambered a bullet, before entering the building (R.A. 15-20). When the police arrived and surrounded the building, a male matching the caller's description of one of the men exited the back door of the four-unit building; the man then ignored an order from police to show his hands and "retreated" back inside toward apartment 5A,

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[12] See Commonwealth v. Upton, 394 Mass. 363, 373 (1985).

[13] Inferentially, it was dark: the police were dispatched to the scene on an early March "night" between 5 p.m. and 1:00 a.m. (M. 9). The sun set in Boston that day at 5:40 p.m. (http://www.timeanddate.com/sun/usa/boston?month=3 (last visited June 27, 2016).

closing the door behind him, leaving it locked (R.A. 24). It was plainly "more probable than not" that a crime, likely a home invasion in light of the recent "rash" of home invasions in that area, was in progress once the man retreated from the police. Commonwealth v. Cruz, 373 Mass. 676, 685 (1977).

The police contacted the caller and confirmed the information she relayed when she called 911; the caller also provided further details, including that she saw three men enter rather than two and that she knew what racking a gun sounded like (R.A. 18). And added to all this was that it was dark, she was frightened by what she had seen, and these events took place in an "area" where a "rash" of home invasions had recently been carried out by a "crew," i.e., more than one person, from New York (R.A. 16). Thus, police were rightfully concerned that a home invasion, armed burglary, or some other violent crime was in progress.

Viewed in context, the officers' actions were eminently reasonable -- if not exemplary and commendable -- and it is hard to imagine another competent and responsible officer acting differently given the circumstances. See Commonwealth v. Ortiz,

435 Mass. 569, 573 (2002) ("there existed objectively reasonable grounds to believe that . . . [the victim] was in trouble"). As such, they justifiably entered the first-floor apartment that corresponded with the one into which a man matching the defendant's appearance had "retreat[ed]" when he saw the police.

The ruling was erroneous because it undervalued the significance of the totality of the circumstances, particularly the racking of the gun before the men entered the building. See R.A. 23. There is an important distinction between "racking" a handgun and the mere possession of it, which the judge did not recognize. Rather, to support her ruling that the police lacked probable cause, the judge cited a case (R.A. 23) involving mere possession of a gun, Commonwealth v. Alvarado, 423 Mass. 266, 269-274 (1996) ("[c]arrying a gun is not a crime. Carrying a firearm without a license (or other authorization) is.").

The verb "racking" describes the action of "manipulating [a] gun in a manner that causes a bullet to go into the chamber of the gun." Commonwealth v. Veillette, 2009 WL 586747, *1, 73 Mass. App. Ct. 1126 (Mar. 10, 2009) (unpublished) ("The victim then heard

the defendant 'racking' the gun (manipulating the gun in a manner that causes a bullet to go into the chamber of the gun)."). A racked gun is ready to fire because a bullet has been sprung into the chamber from the loaded magazine. See Commonwealth v. Rosado, 59 Mass. App. Ct. 913, 913, n.1 (2003) ("Racking consists of pulling the slide back on an automatic handgun to load a bullet into the chamber.").

The only reason to rack a gun is to fire it, thus making it "likely to be fired" imminently. Cf. Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 557 (2002)[14] citing Commonwealth v. Alvarado, 423 Mass. 266, 273 (1996) ("while mere possession may not move the [reasonable suspicion] calculus, in circumstances where the gun presents an imminent threat because of shots just fired, ***or likely to be fired***, and thereby presents a "suggestion of threats of violence, acts of violence, impending criminal activity, or concern for public safety," an edge favoring reasonable suspicion is added to the calculus). This was not a situation in which the gun was racked to scare someone: no one

[14] Reasonable suspicion was analyzed in Commonwealth v. Doocey, 56 Mass. App. Ct. 550 (2002); even so, the Court's reasoning regarding the significance of the likely use of a firearm applies equally here in the probable cause context.

was present. Rather, the men immediately entered the building after the gun was racked, thereby creating the reasonable inference that they entered the building with criminal intent. See Commonwealth v. Byfield, 413 Mass. 426, 429-30 (1992), quoting Commonwealth v. Alessio, 377 Mass. 76, 82 (1979) ("We have held repeatedly that a magistrate should rely on '[r]easonable inferences and common knowledge . . . in determining probable cause.'").

"Racking" was a key fact in the caller's tip, far more indicative of criminal intent, and dangerous to the public and the occupants of the building, than mere possession of a gun might have been. Thus, the tip was more like one that someone had pointed a gun at another person, or was in possession of an inherently dangerous firearm, rather than a report of mere possession of a handgun. See Boston Housing Authority v. Guirola, 410 Mass. 820, 828-829 (1991) (warrantless entry by Boston Housing Authority Officer justified "to remove the potential for danger to the community and to the police posed by [a] sawed-off shotgun"); United States v. Lopez, 989 F.2d 24, 26 (1st Cir. 1993) (police lawfully entered apartment after report someone had pointed a sawed-off shotgun, an

"extremely dangerous weapon," at victim). In short, racking the gun was only "slightly removed" from firing the gun. People v. Guzman, 2014 WL 228931, (Cal. Ct. of Appeal 2014) (unpublished) (racking gun considered as part of sufficient evidence of assault with a semi-automatic firearm);[15] see Commonwealth v. Moore, 54 Mass. App. Ct. 334, 338 (2002) (report of shots fired from apartment "created probable cause and exigency").

The judge entirely overlooked the significance of the gun being racked. In her probable cause analysis (R.A. 23), she relied partly on the well-established principle that the report of a gun, standing alone, does not establish either probable cause or reasonable suspicion of a crime because a licensed person can legally carry a firearm. See Commonwealth v. Alvarado, 423 Mass. 266, 269-274 (1994). The judge illustrated her point by citing Samuel and distinguishing it from the facts here:

> There, the caller *also* reported that the defendant had displayed his firearm to a room full of people, stated that he had been

[15] Unpublished Court of Appeals cases are not citable in California, see California Rules of Court, Rule 8.115, but Massachusetts permits the citation of its unpublished opinions. See Appeals Court Rule 1:28.

hired to kill someone, and placed the weapon underneath a pillow.

R.A. 23 (emphasis in judge's memorandum). But Samuel, where the Court ruled that the warrantless entry was permissible, actually supports the Commonwealth's position in this case because the racking of the gun here is comparable to the defendant's menacing actions with the gun in Samuel.[16] See also Commonwealth v. Brookins, 416 Mass. 97, 104 (1993) ("Evidence of possession of a gun, combined with criminal activity and flight, is enough to warrant a finding of probable cause to arrest for unlawfully carrying a firearm.")

The caller's tip was not the only indication of a crime in progress. In fact, there had been a "rash" of "home invasions"[17] "in the area," reportedly by a "crew" from New York, "around the same timeframe" as the tip (R.A. 16; M. 15). Cf. Commonwealth v. Kennedy, 426 Mass. 703, 709-710 (1998) (police may use knowledge of suspect's criminal reputation in probable cause calculus). Even the caller, who was new to the

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[16] In Samuel, this Court found the entry and search justified under the emergency aid exception. Commonwealth v. Samuel, 80 Mass. App. Ct. 560, 562-563 (2011). For an analysis of this exception in the context of the instant case, see pp. 29-33, below.

[17] In Massachusetts, a "home invasion" necessarily involves a weapon. G.L. c. 265, 18C.

area, was aware of these recent "armed robberies"[18] (M. 58). Then, when Sgt. Cerullo saw the defendant, who matched the caller's description of one of the men, and told him to "show his hands," the defendant turned and "retreat[ed]" back toward apartment 5A, further crystalizing the picture of a violent crime in progress (R.A. 24). In light of all this, police had ample probable cause to believe the men were committing a home invasion, armed burglary, or some other crime in the apartment.

B. Exigent Circumstances

In addition to probable cause, "there must be a showing that it was impracticable for the police to obtain a warrant, and the standards as to exigency are strict." Commonwealth v. Forde, 367 Mass. 798, 800 (1975). Factors that have tended to support a finding of exigency "include [1] a showing that the crime was one of violence or that the suspect was armed, [2] a clear demonstration of probable cause, [3] strong reason to believe that the suspect was in the dwelling, and [4] a likelihood that the suspect would

[18] The phrase "home invasion" is, of course, a term of art in Massachusetts criminal law, so it was likely that the caller was referencing the home invasions even though she called them "armed robberies".

escape if not apprehended." Id. at 807. "The need to protect or preserve life or avoid serious injury is [one such] justification for what would be otherwise illegal absent an exigency or emergency." Commonwealth v. Kaeppeler, 473 Mass. 396, 401 (2015) (citations omitted). "In determining whether a warrantless search falls within the narrow exception of exigent circumstances, [the Court] consider[s] the circumstances in their totality and evaluate these circumstances as they were known to the officers at the time rather than with the benefit of leisured retrospective analysis." Commonwealth v. Figueroa, 468 Mass. 204, 212 (2014) (citations and quotations omitted).

The circumstances here met the exigency requirement: the police were aware that a group of three men, one of whom had a loaded handgun, were in the apartment, possibly committing a home invasion, and that the men knew the police were outside the building. This Court has previously determined that "a house break ***without more*** . . . raises the possibility of danger to an occupant and of the continued presence of an intruder and indicates the need to secure the premises." See Commonwealth v.

Fiore, 9 Mass. App. Ct. 618, 620 (1980) (emphasis added). This is in line with "numerous state and federal courts" that "have all held that warrantless entries are justified on the basis of exigent circumstances when the police reasonably believe that a burglary is in progress or has recently been committed." Carroll v. State, 335 Md. 723, 731 (Ct. App. Md. 1994) (collecting cases); see also LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 6.6(b), at 706-707 (2d. ed. 1987) ("Police may also enter private property . . . where [they] reasonably believe that the premises have recently been or are being burglarized.") (footnote omitted).

The judge erroneously focused on the lack of evidence of a disturbance inside the building -- the officers and residents of apartment 7A did not hear cries for help or other distress noises coming from the building (R.A. 24). But the absence of such noises did not negate the exigency presented by the circumstances. See State v. Lemieux, 726 N.W.2d 783, 789 (Minn. 2007), quoting State v. Nunn, 297 N.W.2d 752, 754 (Minn.1980) ("Burglary of a dwelling is not 'deemed a purely property offense because such an

offense *always carries with it the possibility of violence and therefore some special risks to human life.*") (emphasis added).

Indeed, the absence of a commotion was not surprising given that the men had entered "easily," in the words of the caller (R.A. 24). "[P]olice need not wait for screams from within in order to fear for the safety of occupants or themselves." United States v. Lenoir, 318 F.3d 725, 730 (7th Cir. 2003). The report came at a time of day, between 5 p.m. and 1 a.m., when residents were more likely to be home. A quiet entry, with its element of surprise, would hardly have been unexpected from an experienced "crew" of home invaders. It was also possible that armed with this element of surprise, the home invaders could have incapacitated the occupants, before they could make a commotion or otherwise alert anyone. In other words, the absence of a commotion or cries for help was not determinative of whether a violent crime was in progress for purposes of exigent circumstances exception.

Racking the handgun was also an important fact for exigent circumstances purposes because it created a reasonable inference that the men believed the

building was occupied, presenting the need to fire the handgun quickly. Compare Commonwealth v. Saunders, 50 Mass. App. Ct. 865, 875 (2001), S.C., 435 Mass. 691 (2002) (entry permitted under exigent circumstance exception where defendant told victims he had a gun, threatened to shoot them, and then punched the victim). In short, the warrantless entry was permissible even though police were "responding to a threat of violence, and not violence itself." Commonwealth v. DiMarzio, 52 Mass. App. Ct. 746, 750-751 (2001) aff'd as to grounds for entry, 436 Mass. 1012 (2002) (police entry lawful under exigent circumstances exception when responding to report that defendant was intoxicated and threatened to settle an argument with his shotgun).

The caller's concern about reprisal and the reluctance of the neighbors in apartment 7A to speak with the police were also telling for exigency purposes. The caller "kn[e]w one of the guys looked at [her]"; she obviously expected "problems" from having called the police, telling them that she did not want any; and she was "very nervous" when she spoke with Sgt. Simard when he called her back for more information, and wanted to get off the phone

quickly (R.A. 13; M. 57). The neighbors in apartment 7A seemed "very afraid" (M. 76); and although it appeared to the sergeant that they knew who lived in apartment 5A, they said they did not (R.A. 17; M. 18, 53-54). It was obvious to him that they did not want to be involved out of fear of reprisal (M. 76).

In analyzing the exigency, the judge also failed to give sufficient weight to the fact that a man exited apartment 5A and, in the judge's words, "retreated" back inside the apartment when Sgt. Cerullo identified himself as a police officer and commanded him to "show his hands"[19] (R.A. 17). In part, the judge allowed the motion because the police "had no information about the occupants of apartment 5A and nothing that indicated that the men who entered 5-7 Royal Street did not reside there"[20] (R.A. 24).

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[19] There could be no mistaking Sgt. Cerullo as a police officer since he wore a distinctive police jacket (M. 9).

[20] The judge also stated "[t]he evidence did not establish why the officers focused on Apartment 5A and not on either of the second floor apartments" (R.A. 18), but this ignored the evidence that Sgt. Cerullo saw the man exit and reenter this apartment, and the fact that Sgt. Simard "developed intel," inferentially, from the 7A neighbors, who described the layout of the building, that 5A was the only apartment, if not the most likely apartment, to which the man could have retreated (M. 70).

But the "retreat" from the police was akin to running from them. Even if the men had a key, and thereby entered "easily," as the caller said, it was just as possible that they entered easily because the common front door was unlocked. See Commonwealth v. Huffman, 385 Mass. 122, 124 (1982) ("Certain crimes observed by officers create their own exigent circumstances. For example, should an officer observe a murder or other violent disturbance in progress, exigent circumstances would be apparent.").

Once the defendant exited the back door, encountered the police, and ran back inside, the exigency became acute as the perpetrators had become aware of the police presence. See id., 385 Mass. at 125 ("Exigent circumstances may arise if a defendant becomes aware, or is certain to become aware, of an officer's presence.") and Commonwealth v. Bass, 24 Mass. App. Ct. 972 (1987) ("the likelihood that the [the suspect] was armed and on the run constituted exigent circumstances"); contrast Tyree, 455 Mass. at 687 (no exigent circumstances as "the assailants [in the armed robbery that just occurred] were masked and had no reason to believe the store manager might recognize them"). Swift police action was necessary

to avoid an escalation of the situation that could have further endangered the building's occupants, the officers, or others nearby. See Commonwealth v. Moran, 370 Mass. 10, 12 (1976) (exigent circumstances exist where police had reason to believe that seeking a warrant would jeopardize the safety of police or others).

Based on the totality of the circumstances, the police acted reasonably when they decided that immediate entry was the best way to reduce any safety risks presented by these circumstances. And they further acted reasonably in not searching any further once they discovered the three men hiding in the basement. Indeed, as pointed out below, the judge found that the scope of the police's actions after they entered was reasonable (R.A. 27).

In summary, "regardless of how finely the law of search and seizure is parsed and labeled, the ultimate touchstone of art. 14 and the Fourth Amendment is whether a search or seizure was reasonable in the circumstances." Commonwealth v. Moore, 54 Mass. App. Ct. 334, 340 (2002). Here, the police responded to a nighttime 911 call about three men entering a four-unit apartment building with a "racked" gun on a

residential street that had been the scene of home invasions. The police saw a man who fit the description given by the caller: he exited the back door of apartment 5A; he did not stop on instructions from the police; and he "retreated" back inside. By this point, the police knew that the building had a common front door that led to No. 7 (apartments 7A and 7B) and to No. 5 (apartments 5A on the first floor and 5B on the second), but separate rear doors.

The police acted commendably and with focused restraint under the circumstances; "simply put, what else [were they] to do?" Commonwealth v. Davis, 63 Mass. App. Ct. 88, 91 (2005).

II. THE POLICE ENTRY WAS ALSO PERMISSIBLE UNDER THE EMERGENCY AID EXCEPTION.

The judge also erred when she rejected the Commonwealth's alternative argument that the initial entry was warranted under the emergency aid exception to the warrant requirement (R.A. 26-29). This "exception . . . applies when the purpose of the police entry is not to gather evidence of criminal activity but rather, because of an emergency, to respond to an immediate need for assistance for the protection of *life or property.* The need to protect

or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." Commonwealth v. Snell, 428 Mass. 766, 774 (1999) (quotations omitted) (emphasis added).

"To fit within th[is] . . . exception, a warrantless entry and protective sweep must meet two strict requirements. First, there must be objectively reasonable grounds to believe that an emergency exists . . . . Second, the conduct of the police following the entry must be reasonable under the circumstances, which here means that the protective sweep must be limited in scope to its purpose – a search for victims or suspects." Commonwealth v. Peters, 453 Mass. 818, 823 (2009) (citations omitted). Even though there may be some overlap in the rationales underlying the probable cause/exigent circumstances and the emergency aid exceptions, the main distinction between the two is that under the latter, the police action must be entirely divorced from an intent to discover evidence of a crime. Here, even if this Court finds that the police lacked probable cause to believe that a crime was being committed, their warrantless entry was justified based on a reasonable concern that any

occupants of the building were in danger of serious injury. See Commonwealth v. Marchione, 384 Mass. 8, 11 (1981) ("The circumstances . . . quite clearly presented an emergency situation requiring immediate action for the protection of life and property.")

As discussed above, the police had reasonable grounds to believe that a home invasion, or some other violent crime, was in progress.[21] Compare Commonwealth v. Lindsey, 72 Mass. App. Ct. 485, 488 (2008) (warrantless entry justified under emergency aid exception where police received report of elderly woman outside in distress and asked for assistance, and they assumed she returned home when they could not find her in the area). The immediacy of their concern was demonstrated by the fact that they entered the apartment only five to eight minutes after they arrived, choosing not to await a SWAT team (R.A. 19). Contrast Commonwealth v. Bates, 28 Mass. App. Ct. 217, 221 (1990) (entry not lawful under emergency doctrine

[21] As the judge found, the police actions after the entry were consistent with the rationale underlying the purpose of the emergency aid exception as they ended the warrantless search after discovering nobody in harm's way during the protective sweep and finding the three men in the basement (R.A. 27).

where police waited more than three hours after call to dispatch officers).

The judge ruled that the police had no suggestion of any "danger" or "any violence within the apartment" (R.A. 27-28). This was error: as discussed above, she failed to take into account the significance of the racking of the gun and the defendant's retreat into the building after he encountered Sgt. Cerullo, and she over-emphasized the absence of cries for help. See Commonwealth v. Ringgard, 71 Mass. App. Ct. 197, 200-01 (2008), quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963) ("It has long been recognized that 'a warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, ***to prevent a shooting*** or to bring emergency aid to an injured person.") (emphasis added).

Additionally, the defendant's retreat into the building demonstrated that the men were still present there, supporting the inference that the emergency was ongoing. Contrast Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 842 (2006) (warrantless entry not justified where "by the time the police arrived, no fireworks were being detonated, and according to

Kirschner, the persons responsible were gone"). In short, the police actions in entering the building was "*eminently reasonable*" in light of the threat posed by the men in the building. Commonwealth v. Whitehead, 85 Mass. App. Ct. 134, 141 (2014). As such, the judge erred when she determined that the entry was not justified under the emergency aid doctrine.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of suppression and remand the case for proceedings in the trial court.

FOR THE COMMONWEALTH:

JONATHAN W. BLODGETT
DISTRICT ATTORNEY
FOR THE EASTERN DISTRICT

RONALD E. DEROSA
ASSISTANT DISTRICT ATTORNEY
Ten Federal Street
Salem, Massachusetts 01970
978-745-6610 (ext. 5020)
ronald.derosa@state.ma.us
BBO No. 658915

June 2016

Rule 16(k) Certification

I, Ronald DeRosa, counsel for the Commonwealth, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18 and 20.

Ronald DeRosa
Assistant District Attorney
BBO No. 658915

Date: June 29, 2016

ADDENDUM

ADDENDUM

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G.L. c. 94C, § 32E. Trafficking in marihuana, cocaine, heroin, morphine, opium, etc.; eligibility for parole

(b) Any person who trafficks in a controlled substance defined in clause (4) of paragraph (a), clause (2) of paragraph (c) or in clause (3) of paragraph (c) of Class B of section thirty-one by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of 18 grams or more of a controlled substance as so defined, or a net weight of 18 grams or more of any mixture containing a controlled substance as so defined shall, if the net weight of a controlled substance as so defined, or any mixture thereof is:

(1) Eighteen grams or more but less than 36 grams, be punished by a term of imprisonment in the state prison for not less than 2 nor more than 15 years. No sentence imposed under this clause shall be for less than a minimum term of imprisonment of 2 years, and a fine of not less $2,500 nor more than $25,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) Thirty-six grams or more, but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than 3 ½ nor more than 20 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 3 ½ years, and a fine of not less than $5,000 nor more than $50,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) One hundred grams or more, but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than 8 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 8 years and a fine of not less than ten thousand nor more than one hundred

thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who trafficks in heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute, or dispense or by bringing into the commonwealth a net weight of 18 grams or more of heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof or a net weight of 18 grams or more of any mixture containing heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof shall, if the net weight of heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof or any mixture thereof is:--

(1) Eighteen grams or more but less than 36 grams, be punished by a term of imprisonment in the state prison for not less than 3 ½ nor more than 30 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 3 ½ years, and a fine of not less than $5,000 nor more *than $50,000 may be imposed but not in lieu of the* mandatory minimum term of imprisonment, as established herein.

(2) Thirty-six grams or more but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than 5 nor more than 30 years. No sentence imposed under this clause shall be for less

than a mandatory minimum term of imprisonment of 5 years, and a fine of not less than $5,000 nor more than $50,000 may be imposed, but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) One hundred grams or more but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than 8 nor more than 30 years. No sentence imposed under the provisions of this clause shall be for less than the mandatory minimum term of imprisonment of 8 years, and a fine of not less than ten thousand nor more than one hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established therein.

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than 30 years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established therein.

G.L. c. 265, § 18C. Entry of dwelling place; persons present within; weapons; punishment

Whoever knowingly enters the dwelling place of another knowing or having reason to know that one or more persons are present within or knowingly enters the dwelling place of another and remains in such dwelling place knowing or having reason to know that one or more persons are present within while armed with a dangerous weapon, uses force or threatens the imminent use of force upon any person within such dwelling place whether or not injury occurs, or intentionally causes any injury to any person within such dwelling place shall be punished by imprisonment in the state prison for life or for any term of not less than twenty years.

G.L. c. 268, § 34A. Furnishing false name or Social Security number to law enforcement officer or official; penalty; restitution

Whoever knowingly and willfully furnishes a false name or Social Security number to a law enforcement officer or law enforcement official following an arrest shall be punished by a fine of not more than $1,000 or by imprisonment in a house of correction for not more than one year or by both such fine and imprisonment. Such sentence shall run from and after any sentence imposed as a result of the underlying offense. The court may order that restitution be paid to persons whose identity has been assumed and who have suffered monetary losses as a result of a violation of this section.

73 Mass.App.Ct. 1126
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Thomas VEILLETTE.

No. 08–P–738.
|
March 10, 2009.

By the Court (McHUGH, MILLS & GRAHAM, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The defendant was convicted of assault by means of a dangerous weapon (a handgun), unlawful possession of a firearm, and possession of ammunition without a firearms identification card after a jury-waived trial in Superior Court. On appeal, he alleges that the evidence was insufficient to establish that he committed an assault. In addition, he contends that the judge erred in admitting in evidence testimonial hearsay in the form of a ballistics certificate thereby violating his Sixth Amendment right under the Federal Constitution to confront witnesses. We affirm.

1. *Sufficiency of the evidence.* Viewed in the light most favorable to the Commonwealth, see *Commonwealth v. Latimore,* 378 Mass. 671, 676–677, 393 N.E.2d 370 (1979), the evidence was sufficient to support the findings. The victim, a bouncer working in a Springfield bar and lounge, was drawn to the lounge parking lot as a result of a noisy dispute between a man and woman. As he approached the couple he was confronted by the defendant who exited a nearby vehicle. The defendant, while standing fifteen feet from the victim, reached with his right hand to his left side as if to pull some type of weapon from his clothing and said, in part, "[a]pproach my man, and I'm going to have to burn you." The victim then heard the defendant "racking" the gun (manipulating the gun in a manner that causes a bullet to go into the chamber of the gun). The victim immediately put both hands in the air and walked backward into the lounge. Once inside the lounge he reported the incident to the police.

The defendant contends that the evidence is insufficient as matter of law to constitute an assault by means of a dangerous weapon because, by his words, the victim was aware that the threat of harm was conditional. We disagree. At best, the action of the defendant was ambiguous, and therefore a question for the fact finder. On these facts, the judge was clearly warranted in finding the defendant guilty. See *Commonwealth v. Chambers,* 57 Mass.App.Ct. 47, 49, 781 N.E.2d 37 (2003) (immediately threatened battery requires proof that the defendant engaged in objectively menacing conduct with intent of causing apprehension of immediate bodily harm on the part of victim).

2. *Ballistics certificate. Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), precludes the admission in evidence of testimonial hearsay against a criminal defendant unless the declarant is available to testify at trial or the defense had a prior opportunity to examine the declarant. The defendant, relying on *Crawford,* argues that the ballistics certificate, admitted in evidence pursuant to G.L. c. 140, § 121A, was "testimonial," and therefore its admission violated his Sixth Amendment right to confrontation. That argument has been rejected in decisions of the Supreme

Judicial Court and this court. See *Commonwealth v. Verde,* 444 Mass. 279, 282, 827 N.E.2d 701 (2005) [1]; *Commonwealth v. Morales,* 71 Mass.App.Ct. 587, 588–589, 884 N.E.2d 546 (2008). [2]

1 In *Commonwealth v. Verde,* 444 Mass. at 283, 827 N.E.2d 701, quoting from *Commonwealth v. Slavski,* 245 Mass. 405, 417, 140 N.E. 465 (1923), the court held that a certificate of analysis of narcotics, under G.L. c. 111, § 13, is a "record of a primary fact made by a public officer in the performance of [an] official duty" that does not violate the defendant's confrontation right.

2 In *Commonwealth v. Morales,* 71 Mass.App.Ct. at 588–589, 884 N.E.2d 546, this court determined that a ballistics certificate "from a qualified ballistics expert that the gun and cartridges seized from the defendant were a working firearm and ammunition" was a "record of primary fact made by a public officer," quoting from *Commonwealth v. Verde, supra,* that did not violate the defendant's Sixth Amendment confrontation rights.

***2** Moreover, the defendant failed to object to the introduction of the ballistics report on hearsay grounds at trial. Since there was no objection related to the defendant's right to confront the witnesses against him, we examine the issue to determine whether a substantial risk of a miscarriage of justice was created. *Commonwealth v. Caparella,* 70 Mass.App.Ct. 506, 515–517, 874 N.E.2d 682 (2007). In this case the defendant made no challenge to the assertion that the weapon the police later confiscated from the defendant was, indeed, a firearm. Since there was no live issue at trial as to whether the item retrieved from the defendant was an operable firearm, the defendant has not demonstrated how the alleged violation of his right of confrontation resulted in a substantial risk of a miscarriage of justice. [3]

3 Since November 10, 2008, the United States Supreme Court has had under advisement the case of *Commonwealth v. Melendez–Diaz,* 69 Mass.App. 1114 (2007), cert. granted sub nom. *Melendez–Diaz v. Massachusetts,* ——U.S. ——, 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008). At issue there is whether the admission of forensic science certificates, as prima facie evidence of the primary facts stated therein, runs afoul of *Crawford v. Washington, supra.* However, even if the Supreme Court decides that the certificate of analysis in that case violates the confrontation clause, such a holding would not alter our analysis here that the admission of the ballistics report did not create a substantial risk of a miscarriage of justice.

Judgments affirmed.

All Citations

73 Mass.App.Ct. 1126, 901 N.E.2d 1266 (Table), 2009 WL 586747

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Court of Appeal,
Second District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,
v.
Dennis GUZMAN, Defendant and Appellant.

B242359
|
Filed January 22, 2014

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed. (Los Angeles County Super. Ct. No. BA385965)

Attorneys and Law Firms

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

KLEIN, P.J.

*1 Dennis Guzman appeals the judgment following a jury trial in which he was found guilty of two counts of assault with a semiautomatic firearm, with findings of a personal use of a firearm (Pen.Code, §§ 245, subd. (b), 12022.5, subd. (a); counts 3 and 4), [1] and of one count of unlawfully carrying a loaded firearm (§ 12031, subd. (a)(1); count 5). [2]

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The jury acquitted appellant of two counts of attempted second degree murder (§§ 664, 187, subd. (a)) and of one count of assault with a semiautomatic firearm. (§ 245, subd. (b).)

At sentencing, the trial court selected count 4, assault with a semiautomatic firearm, as the base term. It imposed the middle term of six years, enhanced by an upper term of 10 years for the firearm use enhancement, a total of 16 years in state prison. It then imposed concurrent terms of 16 years for the count 3 assault with a semiautomatic firearm, enhanced with a 10–year upper term for the firearm use, and of two years for count 5, carrying a loaded firearm, the latter of which was stayed pursuant to section 654.

CONTENTIONS

Guzman (appellant) contends: (1) the evidence is insufficient to support his convictions of assault with a semiautomatic firearm in counts 3 and 4 as he had no "present ability to inflict injury"; (2) the trial court erred by failing sua sponte to instruct the jury with a unanimity instruction, CALCRIM No. 3500; and (3) there was *Cunningham* error (*Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*)) as he was denied a jury trial on aggravating factors used to impose the firearm use enhancements, or trial counsel rendered ineffective assistance of trial counsel as counsel failed to demand a jury trial on aggravating factors.

BACKGROUND

1. *The prosecution's case-in-chief.*

a. *The assaults.*

Xochitl Rivas (Rivas) was a volunteer drug and alcohol counselor at an alcohol and drug rehabilitation center, "La Decision Es Tuya," which translated into English meant, "The Decision Is Yours." At 4:00 p.m. on June 26, 2011, she was driving to work with her eight-year-old daughter, Nayemma. Several minutes away from work, Rivas saw appellant lying on the sidewalk. It was a hot day, and appellant had ants crawling on his face. Appellant looked and smelled as if he was drunk.

Rivas spoke to appellant in Spanish and invited him to go with her to the rehabilitation center. [3] He appeared to be a bit indecisive and disoriented but got into her car, and she drove him there. They conversed as they drove. When they arrived, appellant got out of the car and stood looking at the center's sign, " 'Alcoholics Anonymous. The Decision Is Yours.' " His face took on an expression of surprise. He said, " 'No, No, I don't want this.' " Rivas explained that his participation was voluntary.

3 At trial, Rivas testified in Spanish with the assistance of a Spanish–to–English interpreter. During the events leading up to the shooting and during the shooting, Rivas, Jesus Chavez (Chavez) and appellant spoke Spanish.

*2 Chavez, a worker at the center, walked out the center's locked front door to meet Rivas and relocked the door. Rivas turned to Chavez and told him appellant was apparently reluctant. Chavez said, "It's for his own good." Appellant looked angry. Rivas repeated, " 'If you don't want to come in, don't go in. It's your decision.' "

Appellant backed up four steps, took out a handgun, raised it over his head and used his other hand to move something atop the gun. He pointed the gun at Chavez and pulled the trigger. The gun clicked and failed to discharge. Chavez ran inside and locked the door. Appellant lowered the gun and raised it again, moved something atop the gun, then pointed it at Nayemma. Rivas said, " 'Please don't shoot at my daughter,' " and pushed Nayemma behind her. Appellant pulled the trigger while pointing the weapon at Nayemma. Rivas heard a click, and again the gun failed to discharge.

Appellant raised the gun a third time, made the same motion atop the gun and pointed it at Rivas. He attempted to discharge the gun again, but it did not fire. Then appellant tripped and fell backwards.

Chavez let Nayemma into the building and relocked the door. Rivas hesitated but went over and stomped on appellant's hand. Appellant let go of the gun, and Rivas took it and entered the locked rehabilitation center.

Appellant paced outside the rehabilitation center demanding the return of his gun. The police arrived and found appellant walking a short distance away. Rivas identified him as her assailant. When the officers contacted appellant, he appeared intoxicated and was combative. Appellant had 23 live rounds of ammunition for the handgun in a pants pocket.

b. *Officer Medina's and the firearm expert's testimony.*

Los Angeles Police Officer Gabriel Medina (Officer Medina) testified that at the assault scene, he took the handgun from Officer Twycross, who was speaking to Rivas. He unloaded it. There were five bullets in its magazine and chamber, and the handgun was ready to be fired. However, the five bullets in the chamber and magazine were loaded into the chamber and magazine backwards. The bullet in the chamber was not "fully seated," and the slide was not completely closed.

Officer Medina explained to the jury how the handgun operated by loading two dummy rounds backwards into appellant's gun. The dummy rounds fed from the magazine into the chamber. However, the dummy rounds were a different size than the bullets in appellant's magazine, and they currently were not causing a jam. The dummy rounds did block the slide from moving completely, which prevents that gun, if it is operating as originally designed by the manufacturer, from firing. In the backwards-loaded condition the firearm was in when the officers recovered the weapon, the assailant could pull the trigger, but the hammer initially would not drop. When the dummy rounds were fed into the chambers backward, it prevented the slide from closing completely, and the gun jammed. However, the officer was able to manipulate the handgun until the dummy bullet compressed. At that point, the slide closed a little more, and the hammer was able to drop.

Officer Paul Choung, a firearms expert, testified that the recovered handgun was a Browning BDA–380 semiautomatic firearm. The handgun was "fully functional." He explained once the magazine is in the gun, you can "rack" the slide back and when the slide moves forward, a bullet is chambered. In this position, the gun is cocked, the operator can pull the trigger, and the gun will discharge. To fire the first round from appellant's firearm, you have to "rack" the slide, or pull it toward you. After the first round, the gun automatically feeds the next bullet in the magazine into the chamber. If the gun jams, you will have to move the slide backwards and forwards manually. If the slide is not all the way forward, you would not be able to pull the trigger or to hear the "main click" of the hammer dropping. Once you initiate firing by pulling back on the slide, you can pull the trigger and discharge the firearm twice before it again locks in its open position.

*3 When appellant's firearm was working properly, one cannot discharge a bullet from the chamber unless the magazine is inserted. Appellant's firearm, however, was fully functional without the magazine. If the gun jammed or malfunctioned, one can correct the malfunction by moving the slide back and forth to eject the bullet and remove any obstruction in the chamber. Then the handgun can be reloaded from the magazine by pulling back the slide and chambering a bullet.

2. *The defense.*

Anthony Paul, a former Philadelphia police officer and firearms expert, testified that he used live ammunition, not a dummy round, to test appellant's handgun. When live ammunition was loaded in the magazine backwards, the bullets did not enter the chamber; the bullet was forced down into the magazine well. The click heard when the trigger is pulled is not the hammer falling. The improperly-fed cartridge holds the slide to the rear in a position that does not permit the disconnector to engage. With the backwards feed, the firing pin did not strike the bullet three out of three times he pulled the trigger attempting to discharge the handgun. He opined that the click Rivas heard when appellant pulled the trigger was the slide "running home" on the improperly-fed cartridge. He concluded that the handgun would not discharge a round when live rounds were improperly loaded into the magazine.

During cross-examination, Paul explained that in his 50 years of experience, he had never seen this particular firearm discharge when the bullets were fed into the magazine and chamber backwards. He asserted, "I can't say it's not going to

happen, but I can say I never experienced it." He said that a dummy round, which lacked any explosive filler, fed into the chamber backwards could enter a chamber when the slide was maneuvered, compressing the round. When the prosecutor asked the expert to use live ammunition to demonstrate his experiment with the gun, Paul refused. He said there is a remote possibility that even the live ammunition could compress, and the explosives in a bullet are very sensitive. If the firing pin hit the wrong end of the bullet, it is possible the bullet would explode and matter would be discharged out the handgun's barrel at great velocity.

Paul admitted that if the handgun jammed due to improper feed, the cartridge can be removed quite quickly by pushing the slide and simultaneously hitting the magazine release button, ejecting the improperly seated round in the chamber. At that point, the gun can be discharged immediately by manually reinserting a round into the chamber. It is awkward to load the handgun this way, but it can be done.

DISCUSSION

1. *Sufficiency of the evidence.*

a. *The standard of review.*

Recently, in *People v. Whisenhunt* (2008) 44 Cal.4th 174 (*Whisenhunt*), the California Supreme Court summarized the well-established standard of review.

" 'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence.... [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citation.]" (*Whisenhunt, supra,* 44 Cal.4th at p. 200.)

***4** " ' "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"....' [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303–304, 306.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Indeed, " '[t]he testimony of a single witness *is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions.* [Citations.]' " (*In re Robert V.* (1982) 132 Cal.App.3d 815, 821.)[4]

4 Appellant raised the sufficiency of the evidence in the trial court on the same ground in his section 1118.1 motion and motion for a new trial. The motions were denied.

b. *The other relevant legal principles.*

The elements of an assault with a semiautomatic firearm are as follows: (1) The defendant did an act with a semiautomatic firearm that by its nature would directly and probably result in the application of force to a person; (2) the defendant did the act willfully; (3) when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and (4) when the defendant acted, he had the present ability to apply force with a semiautomatic weapon. (*People v. Hartsch* (2010) 49 Cal.4th 472, 507 (*Hartsch*); *People v. Williams* (2001) 26 Cal.4th 779, 784–788 (*Williams*).)

An assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur; it requires only an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another. (*Williams, supra,* 26 Cal.4th at p. 790.) Pointing a gun at someone in a menacing manner is sufficient to establish the requisite mental state. (*Hartsch, supra,* 49 Cal.4th at p. 507.)

"[W]hen a defendant equips and positions himself to carry out a battery, he has the 'present ability' required [for an assault] if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*People v. Chance* (2008) 44 Cal.4th 1164, 1172 (*Chance*).) The defendant must have an actual, not merely apparent, ability to inflict injury. "Present ability" is negated only where the circumstances of the injury turn out to be impossible for reasons unrelated to the defendant's preparations. (*Ibid.*) A defendant has committed an assault where he has actually launched his attack but failed because of some unforeseen circumstance which made success impossible. (*Id.* at p. 1174.)

c. *The analysis.*

In *People v. Ranson* (1974) 40 Cal.App.3d 317 (*Ranson*), the defendant pointed a .22–caliber rifle at an officer. The rifle held by the *Ranson* defendant was definitely loaded and operable; however, the top cartridge that was to be fired was fed into the chamber at an angle causing the rifle to jam. There was trial evidence from which the trier of fact could infer appellant knew how to take off and rapidly reinsert the clip. (*Id.* at pp. 319–320.) On appeal, the defendant argued the jammed condition of the rifle negated any present ability to inflict injury.

***5** The *Ranson* court rejected the argument. It held the evidence of present ability was sufficient, even though the defendant had to do much more than turn around to use his weapon against the officer. He had to remove the clip, dislodge the jammed cartridge, reinsert the clip, chamber a round, point the weapon and pull the trigger. (*Ranson, supra,* 40 Cal.App.3d at p. 321.)

Following *Ranson,* the California Supreme Court decided another similar case, *Chance, supra,* 44 Cal.4th 1164. At page 1172 of *Chance,* the court cited *Ranson* with approval. It explained the "present ability" element of assault is satisfied when a defendant has attained the means and location to strike immediately. In the context of "present ability," "immediately" does not mean instantaneously. It simply means the defendant must have the ability to inflict injury on the present occasion. An assault occurs even if the defendant is several steps away from inflicting injury, or if the victim is in a protected position so that the injury would not be immediate in the strictest sense of that term. (*Chance,* at p. 1171.)

In *Chance,* the court found an assault had occurred during an armed confrontation with a police officer. After the confrontation, the officers discovered appellant's gun had a fully loaded magazine. There was no round in the firing chamber, but the defendant only had to pull back a slide mechanism in order to chamber a round and fire. The gun's safety was off. (*Chance, supra,* 44 Cal.4th at p. 1169.)

In this instance, appellant contends that the evidence is insufficient to support the jury verdicts for assault with a semiautomatic firearm. He argues the evidence is insufficient to support these verdicts as the record discloses appellant "need[ed] to perform additional acts such as correctly reloading the weapon before he could actually be in position to apply force to the victims," and accordingly, he failed to have the "present ability" to commit the assault. He urges the expert testimony amounted to evidence there was only the remotest of possibilities the firearm could be discharged with the backward feed.

We find no merit in his contention. Appellant was only slightly removed from being immediately able to fire his weapon. His firearm was fully functional. He attempted to shoot the victims by pointing the handgun at them and pulling the handgun's trigger. The handgun jammed and would not fire as the slide could not close over an improperly-fed round in the chamber, which in turn prevented the hammer from falling and the firing pin from striking the butt of the round. This conduct was near enough to completion to constitute the "present ability" needed for an assault. According to the defense's own firearms expert, it would have taken appellant seconds to remove the jam from the weapon and reload the firearm manually with an ejected bullet or one in his pocket.

It is irrelevant to our substantial evidence analysis that appellant did not do so as he was so intoxicated it did not occur to him to quickly eject and rechamber the bullet so he could discharge his handgun. Appellant was sufficiently "along the continuum of conduct toward battery" to hold him criminally liable for his conduct. (*Chance, supra,* 44 Cal.4th at p. 1173.) All he needed to do was push a button, releasing the magazine, and clear the jam. The incorrectly-inserted round would fall out, and appellant could manually reload a new round into his gun's chamber in a fully-seated position.

***6** Also, the defense expert could not be absolutely certain appellant's manipulation of the slide might not compress and then push the backwards-fed bullet into the chamber, making it possible to discharge the live round from the chamber; i.e., there was no unequivocal evidence that discharging the round from appellant's firearm was impossible. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 109–110 [distinguishing the assault in *Valdez* from cases where it was established it would have been impossible to inflict injury].)

Furthermore, a jury is not permitted to consider appellant's intoxication in determining whether he committed felonious assault. (*People v. Rocha* (1971) 3 Cal.3d 893, 898; see *Williams, supra,* 26 Cal.4th at pp. 785–790 [voluntary intoxication does not justify an assault as assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another].)

2. *Jury instruction on unanimity.*
Appellant contends that certain comments by the prosecutor during closing argument concerning bludgeoning the victims presented an alternative theory of guilt that required a sua sponte unanimity jury instruction, such as CALCRIM No. 3500.

During his closing argument, the prosecutor argued, in pertinent part, as follows.

"And the only question is when he's pointing the gun at Nayemma and her mother, what is the intent? ... [¶] He did that on purpose. He pointed the gun. He pulled it out for a reason. He was angry when he realized where he was. His attitude significantly changed, and he became angry at [Chavez], but really, particularly, his anger was focused on Ms. Rivas, and so when he pulled out the gun and pointed it at her, he did that on purpose. That wasn't an accident. [¶] And he knew and a reasonable person like you or I would realize that that's the sort of act that could result in force. *He's five feet away. If he wanted to, he could have taken the gun and swung it at them, and that would be an assault because this gun can be used not just to fire, but to hit a person, but he didn't just have that ability.* [¶] He had the ability to do what he then proceeded to do which was move the slide back to bring one round from the magazine into the chamber, and that moment when he's trying to take that step of pulling the trigger, there is an ability to shoot. [¶] ... [¶] He had the ability to do what he

then proceeded to do which was move the slide back to bring one round from the magazine into the chamber, and that moment when he's trying to take that step of pulling the trigger, there is an ability to shoot." (Italics added.)

This contention also lacks merit.

"In a criminal case, a defendant has the constitutional right to a unanimous jury verdict. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) Furthermore, 'the jury must agree unanimously the defendant is guilty of a *specific* crime.' (*Russo*, at p. 1132.) 'Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act "is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." ' (*Ibid.*)" (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1374–1375.)

*7 The complained of comments were not an argument the one charge of assault per victim was committed by two discrete criminal acts; i.e., appellant swung his gun at each victim, then pointed the gun at the victim and attempted to shoot her. The prosecutor did not present the bludgeoning comment as one of two alternate theories on how the criminal acts of assault occurred on Nayemma and Rivas. His bludgeoning comment was an aside mentioning appellant could also be guilty of assault if he had tried to swing with the gun at the victims, attempting to use the gun as a bludgeon. But the prosecutor clarified before continuing with his argument that no bludgeoning occurred here.

In any event, "unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.]" (*Russo, supra,* 25 Cal.4th at p. 1135; *Ortiz, supra,* 208 Cal.App.4th at p. 1375.) "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of [a crime] as that offense is defined by statute, it need not decide unanimously by which theory he is guilty." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918.)

The trial court had no sua sponte duty to instruct on unanimity.

Further, even if this court found the prosecutor's remarks to be ambiguous, no reversal is required. The jury would not have been confused by the prosecutor's argument and disagreed as to the actual criminal acts appellant had committed. There were two charges here, and two criminal acts, one directed individually at each of two victims. "The erroneous failure to give a unanimity instruction is harmless [beyond a reasonable doubt] if disagreement among the jurors concerning the different specific acts proved is not reasonably possible." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119 & fn. 8.)

3. Cunningham *error.*

a. *The right to a jury trial.*

At sentencing on June 28, 2012, the trial court imposed upper terms of 10 years each for the two firearm use enhancements.

Asserting the trial court imposed the upper term based on facts not submitted to the jury, appellant contends the trial court violated his constitutional right to have a jury find every fact used to impose punishment. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 470 (*Apprendi*); *Cunningham v. California* (2007) 549 U.S. 270, 274–275.)

Effective January 1, 2010, section 1170.1, subdivision (d), was amended to remove the presumption of the middle term for enhancements. (Stats. 2009, ch. 171, § 5.) The statute now states in relevant part, "If an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing." (§ 1170.1, subd. (d).)

The amendment to subdivision (d) of section 1170.1 was a response to the decisions in *Apprendi* and *Cunningham* and essentially eliminated the middle term as the statutory maximum absent aggravating factors. This new legislation makes the upper term the statutory maximum. Trial courts now have the discretion to select among the lower, middle, and upper terms without stating ultimate facts deemed to be aggravating or mitigating under the circumstances and without weighing aggravating and mitigating circumstances. Thus, no jury trial was required on any factors mentioned by the trial court in imposing the upper terms for the firearm use enhancements.

***8** In appellant's case, there is no problem with retroactivity. *In People v. Sandoval*, (2007) 41 Cal.4th 825 at pages 845–857, the Supreme Court held it is constitutionally appropriate to apply the amended version of the determinate sentencing law in all sentencing proceedings conducted after the effective date of the amendments, regardless of whether the offense was committed prior to the effective date of the amendments. In any event, appellant committed his offenses on June 26, 2011, well after the January 1, 2010, effective date of the amendment. (*Id.* at p. 857; *People v. Jones* (2009) 178 Cal.App.4th 853, 866–867.) Accordingly, *Apprendi* and *Cunningham* do not apply to appellant's sentencing under the determinate sentencing law.

b. *Ineffective trial counsel.*

Appellant makes a claim of ineffective trial counsel in the event this court finds he forfeited the above sentencing contention as his trial counsel failed to demand a jury trial on factors in aggravation of the upper term. However, the Attorney General makes no claim of a forfeiture. Furthermore, as appellant was not entitled to a jury trial on aggravating factors, trial counsel's failure to object on *Apprendi* and *Cunningham* grounds does not amount to a deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 688, 687–692; *People v. Benavides* (2005) 35 Cal.4th 69, 92–93 ["To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance [is] deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.]]".)

DISPOSITION

The judgment is affirmed.

We concur:

KITCHING, J.

ALDRICH, J.

All Citations

Not Reported in Cal.Rptr.3d, 2014 WL 228931

RECORD APPENDIX

RECORD APPENDIX

Table of Contents

1477CR00455 Commonwealth vs. Arias, Jose L.

Case Type Indictment
Status Date: 04/27/2015
Case Judge:
Next Event: 08/15/2016

Case Status Open
File Date 04/14/2014
DCM Track:

All Information | Party | Charge | Event | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias	Attorney/Bar Code	Phone Number
	Gillespie, Esq., Kimberly (673009)	

More Party Information

Arias, Jose L. - Defendant

Alias	Attorney/Bar Code	Phone Number
	Horwich, Esq., Esther Joanne (240740)	
	Wright, Esq., Stephen James (552751)	

More Party Information

Party Charge Information

Arias, Jose L. - Defendant

Charge # 1 : **94C/32E/H-0 -** HEROIN/MORPHINE/OPIUM, TRAFFICKING IN 200 GRAMS OR MORE c94C §32E(c)

Original Charge	94C/32E/H-0 HEROIN/MORPHINE/OPIUM, TRAFFICKING IN 200 GRAMS OR MORE c94C §32E(c)
Indicted Charge	
Amended Charge	

Arias, Jose L. - Defendant

Charge # 2 : **94C/32E/A-2 -** COCAINE, TRAFFICKING IN 18 GRAMS OR MORE, LESS THAN 36 GRAMS c94C §32E(b)

Original Charge	94C/32E/A-2 COCAINE, TRAFFICKING IN 18 GRAMS OR MORE, LESS THAN 36 GRAMS c94C §32E(b)
Indicted Charge	
Amended Charge	

Arias, Jose L. - Defendant

Charge # 3 : **268/34A-0 - Misdemeanor - more than 100 days incarceration** FALSE NAME/SSN, ARRESTEE FURNISH c268 §34A

Original Charge	268/34A-0 FALSE NAME/SSN, ARRESTEE FURNISH c268 §34A (Misdemeanor - more than 100 days incarceration)
Indicted Charge	
Amended Charge	

Events

Date	Session	Location	Type	Event Judge	Result
05/29/2014 09:30 AM	Criminal 1 - K		Arraignment		Rescheduled
06/13/2014	Criminal 1 - K		Arraignment	R.A. 1	Not Held

11:00 AM					
04/27/2015 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Arraignment	Lu, Hon. John T	Held as Scheduled
06/02/2015 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Evidentiary Hearing on Suppression	Lu, Hon. John T	Not Held
06/02/2015 12:00 PM	Criminal / Civil (Lawrence)	LAWRENCE-2nd FL, CR 3 (SC)	Evidentiary Hearing on Suppression	Inge, Hon. Garry V	Not Held
06/02/2015 12:00 PM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Evidentiary Hearing on Suppression	Lu, Hon. John T	Not Held
07/23/2015 12:00 PM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Evidentiary Hearing on Suppression	Lu, Hon. John T	Not Held
07/23/2015 12:00 PM	Criminal 3 - I	SALEM-5th FL, CR I (SC)	Evidentiary Hearing on Suppression		Not Held
08/19/2015 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Jury Trial	Lu, Hon. John T	Rescheduled
09/22/2015 12:00 PM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Evidentiary Hearing on Suppression	Lu, Hon. John T	Not Held
09/22/2015 12:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Evidentiary Hearing on Suppression		Not Held
10/01/2015 02:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Evidentiary Hearing on Suppression	Lang, Hon. James F	Not Held
10/26/2015 02:00 PM	Criminal 3 - I	SALEM-5th FL, CR I (SC)	Evidentiary Hearing on Suppression		
10/26/2015 02:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Evidentiary Hearing on Suppression	Rup, Hon. Mary-Lou	Not Held
10/27/2015 02:00 PM	Criminal 3 - I	SALEM-5th FL, CR I (SC)	Evidentiary Hearing on Suppression	Rup, Hon. Mary-Lou	Not Held
10/27/2015 02:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Evidentiary Hearing on Suppression	Rup, Hon. Mary-Lou	Not Held
11/06/2015 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Trial Assignment Conference	Lu, Hon. John T	Held as Scheduled
02/01/2016 09:30 AM	Criminal 1 - K		Bail Hearing		Held as Scheduled
02/16/2016 09:30 AM	Criminal 1 - K		Final Pre-Trial Conference		Not Held
02/17/2016 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Conference to Review Status	Feeley, Hon. Timothy Q	Held as Scheduled
03/01/2016 09:30 AM	Criminal 1 - K		Jury Trial		Not Held
05/04/2016 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Conference to Review Status	Drechsler, Hon. Thomas	Held as Scheduled
08/15/2016 09:30 AM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Conference to Review Status	Feeley, Hon. Timothy Q	

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/14/2014	Indictment returned	1	
05/29/2014	Summons for arraignment issued ret 6/13/14		
06/13/2014	Warrant on indictment issued (Defendant deported 6/3/14)	2	
01/05/2015	Jose Luis Arias 11/21/87 was before the court Lu, J. today, after being sent here by Lynn D.C. Court has determined that he is not the	3	

	being sent here by Lynn D.C. Court has determined that he is not the defendant in this matter.	
03/14/2015	Warrant CKA alias created for party #1 Alias Name: Jose Arias	
04/27/2015	Defendant waives reading of indictment	
04/27/2015	Defendant arraigned before Court.	
04/27/2015	Bail set at $0.00 Surety, $100,000.00 Cash.	5
04/27/2015	Bail warnings read	
04/27/2015	Recalled: Default Warrant cancelled on 04/27/2015 for Arias, Jose L.	
04/27/2015	Event Result: The following event: Arraignment scheduled for 04/27/2015 09:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/27/2015	Habeas Corpus for defendant issued to Essex House of Correction returnable for 06/02/2015 12:00 PM Evidentiary Hearing on Supression.	
04/27/2015	Commonwealth 's Notice of automatic discovery 1 filed in court	4
05/18/2015	Defendant 's Motion to suppress evidence seized.	6
05/28/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 06/02/2015 12:00 PM has been resulted as follows: Result: Not Held Reason: Transfered to another session Appeared:	
05/28/2015	Habeas Corpus for defendant issued to Essex House of Correction returnable for 06/02/2015 12:00 PM Evidentiary Hearing on Suppression.	
06/01/2015	Habeas Corpus for defendant issued to Essex House of Correction returnable for 06/02/2015 09:30 AM Evidentiary Hearing on Suppression.	
06/02/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 06/02/2015 12:00 PM has been resulted as follows: Result: Not Held Reason: Not reached by Court Appeared:	
06/02/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 06/02/2015 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties Appeared:	
06/16/2015	Habeas Corpus for defendant issued to Essex House of Correction returnable for 08/19/2015 09:30 AM Jury Trial.	
06/16/2015	Habeas Corpus for defendant issued to Essex House of Correction returnable for 07/23/2015 12:00 PM Evidentiary Hearing on Suppression.	
07/15/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 07/23/2015 12:00 PM has been resulted as follows: Result: Not Held Reason: Transfered to another session Appeared:	
07/23/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 07/23/2015 12:00 PM has been resulted as follows: Result: Not Held Reason: Request of Defendant Appeared:	
07/23/2015	Event Result: The following event: Jury Trial scheduled for 08/19/2015 09:30 AM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date Appeared:	

07/23/2015	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 09/22/2015 12:00 PM Evidentiary Hearing on Suppression.		
09/16/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 09/22/2015 12:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
09/22/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 09/22/2015 12:00 PM has been resulted as follows: Result: Not Held Reason: Not reached by Court		
09/22/2015	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 10/01/2015 02:00 PM Evidentiary Hearing on Suppression.		
10/01/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 10/01/2015 02:00 PM has been resulted as follows: Result: Not Held Reason: Defendant failed to appear		
10/01/2015	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 10/26/2015 02:00 PM Evidentiary Hearing on Suppression.		
10/01/2015	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 10/27/2015 02:00 PM Evidentiary Hearing on Suppression.		
10/19/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 10/26/2015 02:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
10/19/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 10/27/2015 02:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
10/27/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 10/27/2015 02:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
11/06/2015	Event Result: The following event: Trial Assignment Conference scheduled for 11/06/2015 09:30 AM has been resulted as follows: Result: Held as Scheduled		
12/10/2015	ORDER: Findings of Fact Ruling of Law and Order on Defendant's Motion to Suppress Evidence - It is herby Ordered that the Defendant's Motion to Suppress Evidence Seized pursuant to the Search warrant are Allowed Copies mailed	7	Image
01/05/2016	Commonwealth 's Motion for enlargement of time to file notice of appeal and application for leave to appeal allowance of defendant's motion to suppress .	8	
01/11/2016	Defendant 's Motion of opposition to commonwealth's motion for enlargement of time.	9	
01/12/2016	Opposition to paper #8.0 motion for enlargement of time to file notice of appeal and application for leave to appeal allowance filed by Jose L. Arias	10	
01/12/2016	Endorsement on Motion for enlargement of time, (#8.0): ALLOWED after review and over defendant's objection		
01/12/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Stephen James Wright, Esq. Attorney: Kimberly Gillespie, Esq. Holding Institution: Essex County House of Correction		
01/20/2016	Defendant 's Motion to appoint counsel for Appellate counsel filed and ALLOWED (Feeley,J)	11	
01/20/2016	ORDER: Court finds defendant indigent		
01/20/2016	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 02/01/2016 09:30 AM Bail Hearing.		

02/01/2016	Event Result: The following event: Bail Hearing scheduled for 02/01/2016 09:30 AM has been resulted as follows: Result: Held as Scheduled		
02/01/2016	Defendant oral motion to Reduce Bail DENIED (Feeley,J)		
02/04/2016	Notice of docket entry received from Supreme Judicial Court You are hereby notified that on February 2, 2016, the following was entered on the docket of the above referenced case: ORDER:..."it is ORDERED that the interlocatory appeal shall proceed in the Appeals Court"... (Hines, J.)	12	Image
02/16/2016	Event Result: The following event: Final Pre-Trial Conference scheduled for 02/16/2016 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
02/17/2016	Event Result: The following event: Conference to Review Status scheduled for 02/17/2016 09:30 AM has been resulted as follows: Result: Held as Scheduled		
02/17/2016	Event Result: The following event: Jury Trial scheduled for 03/01/2016 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
02/17/2016	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 05/04/2016 09:30 AM Conference to Review Status.		
02/17/2016	Defendant 's Motion to continue trial allowed -- off the list for 3/1/16 continued to 5/4/16 status	13	
02/29/2016	Appearance entered On this date Esther Joanne Horwich, Esq. added as Appointed - Appellate Action for Defendant Jose L. Arias	14	
03/09/2016	Commonwealth 's Application for leave to appeal allowance of defendant's motion to suppress.	15	
03/14/2016	Appeal: notice of assembly of record	16	
03/18/2016	Notice of Entry of appeal received from the Appeals Court	17	
05/04/2016	Event Result: The following event: Conference to Review Status scheduled for 05/04/2016 09:30 AM has been resulted as follows: Result: Held as Scheduled		

Case Disposition

Disposition	Date	Case Judge
Active	04/27/2015	

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT DEPARTMENT
ESSEX DIVISION
INDICTMENT NO. 2014 ESCR 455

COMMONWEALTH OF MASSACHUSETTS

V

JOSE A. ARIAS

MOTION TO SUPPRESS EVIDENCE SEIZED

Now comes the Defendant in the above entitled complaint and moves to suppress any and all evidence seized from the defendant and #5, Royal Street, Lawrence, Ma and any inculpatory statements allegedly made by the defendant to the Lawrence Police Department or their agents in the course of a search and arrest in Lawrence on Tuesday March 4, 2014. The evidence sought to be suppressed consists of but is not limited to:

US CURRENCY, CONTROLLED SUBSTANCES, AND ANY OTHER TANGIBLE EVIDENCE TO BE OFFERED AT TRIAL AND ANY INCULPATORY STATEMENTS ALLEGEDLY MADE.

In support of the Motion, the Defendant states that the seizure, search and arrest of the defendant were conducted without any reasonable articulable suspicion, without any exigency and without probable cause. That the seizure, search and arrest were conducted without a warrant, without consent, and without probable cause in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, Articles 12 and 14 of the Massachusetts Declaration of Rights and the Massachusetts Constitution and G.L. c. 276, s. 1-3.

The defendant further states that any inculpatory statements allegedly made were made in violation of the Fifth, Sixth and Fourteenth Amendments to the US Constitution and in violation of **Miranda v. Arizona**, 384 us 436, (1966) as well as the Massachusetts Declaration of Rights Articles 12 and 14.

In support thereof the defendant submits the attached Affidavit and Lawrence Police Department police report .

The Defendant
Jose A. Arias
By his attorney,

May 15, 2015

STEPHEN J. WRIGHT, ATTORNEY
170 COMMON STREET, SUITE 200
LAWRENCE, MA 01840
Ph. (978) 685-3377
BBO# 552751

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT DEPARTMENT
ESSEX DIVISION
INDICTMENT NO. 2014 ESCR 455

COMMONWEALTH OF MASSACHUSETTS

V

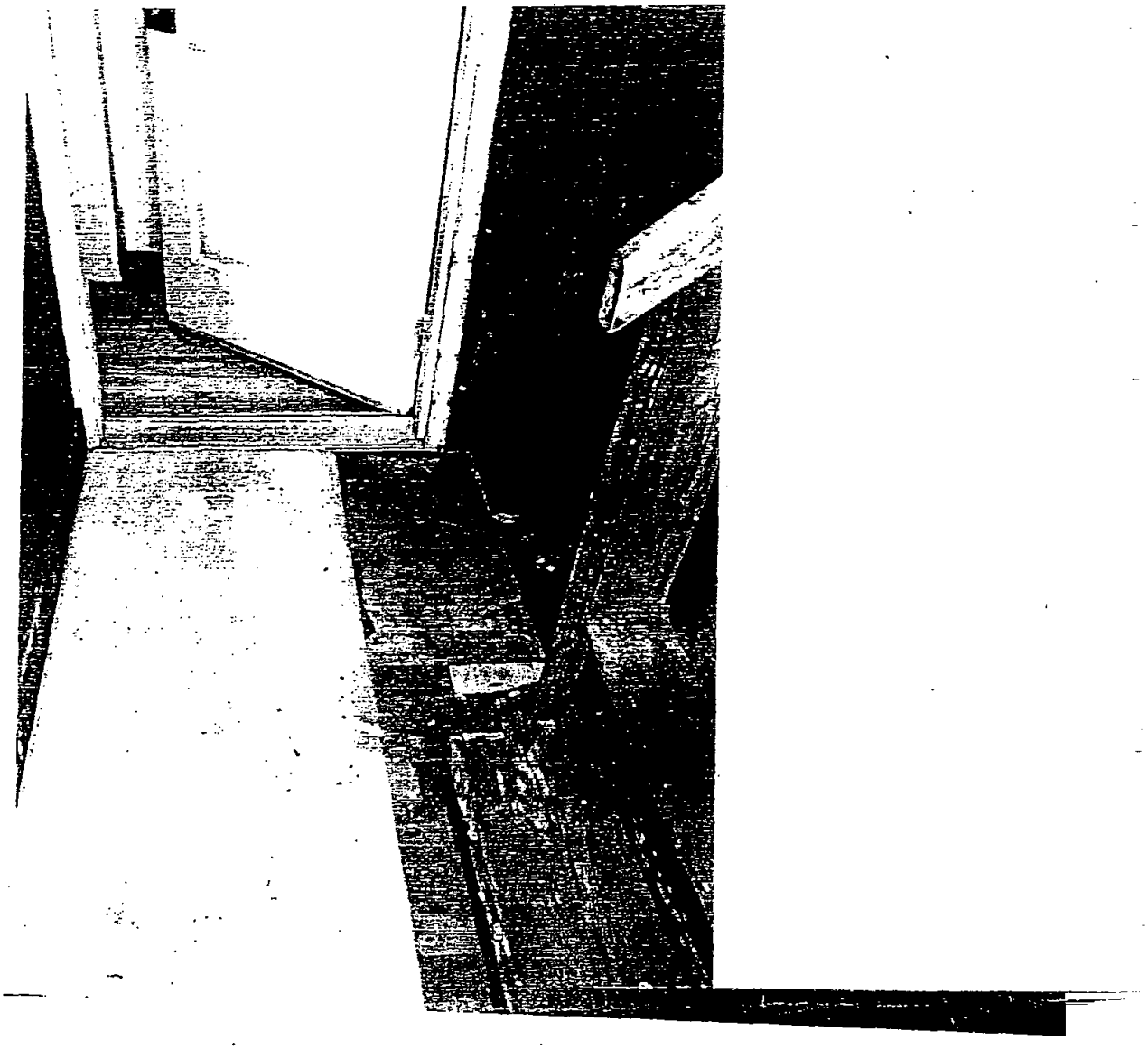
JOSE A. ARIAS

AFFIDAVIT IN SUPPORT OF
MOTION TO SUPPRESS EVIDENCE SEIZED

1. My name is Jose A. Arias and I am the Defendant in the Indictment before the Court.
2. On March 4, 2015 members of the Lawrence Police Department and others entered #5 Royal Street, Lawrence where I was located and searched it without a warrant and seized items located therein.
3. I was searched, questioned and arrested while I was in the basement of #5 Royal Street, Lawrence.
4. At no time did I consent to a search of #5 Royal Street, Lawrence Ma. or my person.
5. The police claim to have found Controlled substances a key and other items on my person and in the apartment.

Signed under the pains and penalties of perjury this day of June, 2015 .

JOSE A. ARIAS



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Commonwealth of Massachusetts

ESSEX County, ss.

ESSEX SUPERIOR COURT
ESCR2014-458

COMMONWEALTH

v.

Alexandra Rios

CRIMINAL
Conversation amongst 911 Operator and Unnamed Caller
to 7 Royal Street

- - - - - - - - - - - - -

Appearances

- - - - - - - - - - - - -

911 Operator
Unnamed Female Caller
Unnamed Male Dispatcher

911 OPERATOR: 9-1-1 this line is recording what is your emergency

UNNAMED CALLER: Hi, I live in 21 Royal Street, umm, by any chance I was just coming down the street umm and I just seen on 7 royal street in that building I seen two guys with a gun and I really freaked out and I don't know what they. But every time, at this time I usually come, I'm getting home,

911 OPERATOR: Where are you right now?

UNNAMED CALLER: well I'm in 21, well Im in 21 royal street

911 OPERATOR: okay, did you recently live in Jaimaica Plain

UNNAMED CALLER: Well yea my phone is from, from Boston

911 OPERATOR: Im just double checking because on my screen it shows that Jamaica Plain address is activity

UNNAMED CALLER: No, yea the phones under my moms moms address in Boston

911 OPERATOR: Okay, alright, so its in the area of 21 Royal Street. Do you have a description of him

UNNAMED CALLER: No, they just had a hat on and everything. All I know is that they were Spanish guys.

911 OPERATOR: What kind of hat, like a winter hat or a baseball ball hat

UNNAMED CALLER: Yea well, they had on a jacket and a coat a sweater or

911 OPERATOR: What Color?

UNNAMED CALLER: I'm not really, I just just walked and I heard them

911 OPERATOR: Light or Dark

UNNAMED CALLER: Yea, light skinned

911 OPERATOR: no the jacket

UNNAMED CALLER: One was grey and the other was black, I'm not really familiar, there's always a little movement in that building, im not really sure what's going on

911 OPERATOR: okay, were they outside?

UNNAMED CALLER: They were actually outside going up to the building. I seem two walk in and I heard when he load the gun, one of them load the gun and I, when I turned I know one of the guys looked at me. It seems like any problem with me? Because if its gonna be a..

911 OPERATOR: No no Im just trying to get as much information as I can so the officers can find these individuals

UNNAMED CALLER: Yea, they went inside the building

911 OPERATOR: They went inside 21 Royal ?

UNNAMED CALLER: No they went in 7 Royal Street

911 OPERATOR: 7 Royal

UNNAMED CALLER: Yea, I live in 21

911 OPERATOR: Okay and do know what - have you seen them before? Do you know what they look like

thanks for things

UNNAMED CALLER: No, like I said, Im new around here which is not going to last long because

911 OPERATOR: Okay okay, Im going to have an officer check the area

UNNAMED CALLER: All right

911 OPERATOR: Okay thank you

UNNAMED DISPATCHER: Any detective or any available north car 7 Royal Street, caller said she saw two Hispanic males enter a house, one in a gray jacket, one in a black jacket, the male was loading gun, was loading a cliffer ~~to~~ a handgun – 7 royal.

RESPONDER TO DISPATCH: 36-out clip in to

UNNAMED DISPATCH: 25-409

7

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2014-0455;
2014-0458 001-002

COMMONWEALTH

vs.

JOSE ARIAS & another[1]

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE

An Essex County grand jury returned indictments charging the defendants, Jose Arias and Alexandra Rios (collectively, the "defendants"), with trafficking in controlled substances (heroin and cocaine) in violation of G. L. c. 94C § 32E. The defendants now move to suppress the evidence seized pursuant to a search warrant that issued based solely on police observations made during an initial warrantless entry into an apartment located at 5 Royal Street, Lawrence. After an evidentiary hearing, based on the evidence that I found credible and the reasonable inferences I have drawn therefrom, the defendants' motions to suppress are ALLOWED.

FINDINGS OF FACT

On the evening of March 5, 2014, the Lawrence Police Department received a "911" call from an unnamed woman calling from her residence at 21 Royal Street. The caller reported that while coming down her street she observed "two guys with a gun" at 7 Royal Street. She described the men as light-skinned and "Spanish" and wearing a hat. One wore a grey jacket and the other wore a black jacket. She stated that she saw the two men outside, going up to and

[1]Alexandra Rios

walking into the building, and that she heard one of the men load a gun. She stated that she was "not really familiar . . . there's always a lot of movement in that building," and that she was "not really sure what's going on." When asked if she had seen the men before or knew what they looked like, the caller replied that she was new to the area.

When the call ended, the dispatcher broadcast the following: that any available detective or police car proceed to 7 Royal Street, where a caller saw two Hispanic males enter a house—one wearing a grey jacket and one wearing a black jacket—and one of the males was loading a gun.

I credit testimony that during this time period, the Lawrence Police Department was actively investigating a "rash" of home invasions in Lawrence and had information that a "crew" of persons from New York was committing the offenses. However, that evidence before the court did not indicate how recently or where these home invasions occurred or if any occurred in the immediate vicinity or neighbor of Royal Street.

Upon hearing the broadcast, a number of Lawrence police officers responded to 7 Royal Street. There, police found a single building multi-family residence with the address of 5 - 7 Royal Street. The building had one front door, marked with numbers "5" on the right side and "7" on the left side of the door. Police would learn that it had four apartments - two on the first floor (5A and 7A) and two on the second floor (5B and 7B).

Sergeant Michael Simard ("Sergeant Simard") was the supervising patrol sergeant for the second shift (5:00 p.m. to 9:00 a.m.) on that date. On arrival, he and other officers (including two detectives) saw no one outside and "secured" the front of the building.

Sergeant Joseph Cerullo ("Sergeant Cerullo"), of the Special Operations Unit, arrived

shortly thereafter and moved to the rear of the building with four other officers, including two from the Essex County canine unit. There, he observed a porch with two doors to the interior. Shortly after they reached the rear, the officers saw an Hispanic male wearing a black and gray sweater quickly come out of the left rear door.[2] With his hand gun drawn, Sergeant Cerullo identified himself, shouting: "Lawrence Police. Show me your hands!" The male appeared shocked, re-entered the residence and closed the door behind him. Sergeant Cerullo and another officer moved to the porch intending to open the door and found it locked. Sergeant Cerullo radioed this information to Sergeant Simard and then moved to the front of the building to speak with him.

While at the front of the residence, Sergeant Simard spoke with residents of the first floor apartment of 7 Royal Street, who denied seeing or hearing anything. They claimed not to know who lived in number 5, but described the lay-out of its first floor apartment. Sergeant Simard described these residents as appearing "scared," but acknowledged that the presence of a number of police cruisers and approximately fifteen police officers - with guns drawn - could have created a frightening atmosphere.

Thinking that he faced a potential emergency that might warrant calling in the SWAT Emergency Team ("SWAT"), Sergeant Simard felt that he had to make a quick decision. He called the dispatcher, who retrieved the telephone number for the 911 caller, whom Sergeant Simard then called.[3] During their conversation, he did not learn the caller's name but learned that

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[2] Sergeant Cerullo described the male as having facial hair.

[3] The record does not make clear if Sergeant Simard spoke first with the residents of 7 Royal Street or the 911 caller.

she lived nearby - at an angle across from 5-7 Royal Street.[4] According to Sergeant Simard, the caller reported having seen three males whom she did not recognize on the front step of the building and that she heard the sound of a gun "racking," characterizing it as a semi-automatic. She claimed that she recognized the sound because she was "from Lawrence." The caller also stated that she believed that one of the men had a key as the men entered the building "easily" and that the men talked calmly before entering. She reported feeling nervous and knowing about recent armed robberies. The officers at the scene learned the above-described information within minutes of their arrival. Based on information obtained, the officers focused their attention on the left side of the building (5 Royal Street), and its first floor apartment - number 5A.[5] Sergeants Simard and Cerullo discussed the information and their concern that armed persons were inside. They had concerns about the safety of persons inside, the possibility of injured persons inside, and the safety of police officers at the scene. Concluding that they faced an emergency situation and insufficient time to call in and wait for arrival of the SWAT team, the officers decided to enter 5A Royal Street at that time.

Prior to entry, officers at the scene heard no gunshots and observed no evidence of any forced entry. They did not see broken, damaged or open door(s); in fact, the entrance door to 5-7 Royal Street and the door to apartment 5A were closed.[6] Police officers heard no cries for help, cries of distress, sounds of property being damaged, commotion or noise from apartment 5A. No

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[4] As noted above, when she called 911 the caller gave her address as 21 Royal Street.

[5] The evidence did not establish why the officers focused on Apartment 5A and not on either of the second floor apartments.

[6] It is reasonable to infer that both door were also intact.

one with whom they spoke reported hearing any shots, noise or commotion from inside the apartment. Sergeant Cerullo saw neighbors gathering outside, but acknowledged that none approached him with information. Sergeants Cerullo and Simard testified that they were concerned of a potential "hostage situation," and thought it possible that persons were being held inside, injured or in danger. However, they acknowledged that they had no knowledge of any victims inside, blockaded entries or anyone making "demands." Police did not seek to determine if any resident in 5A had an FID card or license to carry a firearm; however, I credit testimony that a firearms license check would have taken a significant amount of time.[7]

Within approximately five to eight minutes after police first arrived at the scene, Sergeant Cerullo led a team of officers through the front door of apartment 5A.[8] He moved through the living room to the rear of the apartment, conducting a "protective sweep" for the Hispanic male that he saw earlier and any injured persons. Other officers checked other areas of the apartment. Officers found no persons inside the apartment, but during their protective sweep noticed in open view illegal narcotics, a scale and "thousands" of plastic bags strewn about on the floor.[9] The officers seized nothing at that time.

At the rear of the apartment, Sergeant Cerullo saw a door that opened to a small hallway.

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[7] It seems clear that the police did not know and had not learned the names of the occupants of apartment 5A.

[8] On cross-examination, Sergeant Simard testified that no one responded to a knock at the door to apartment 5A ; however, the evidence did not establish whether the knock came immediately before entry or earlier as police sought to learn about the residence and its occupants.

Sergeant Simard did not know if, before entering apartment 5A, any police officers had gone to the second floor of the building or knocked at doors to either of the second floor apartments.

[9] While not dispositive of what police knew before entry, there was no testimony that any officer observed any out-of-place, upturned or damaged property as might be indicative of a struggle within the apartment.

In that hallway, he saw a door that opened to the exterior and porch of the building,[10] and stairways leading to a basement (which was illuminated) and to the second floor. After confirming the absence of any persons in the apartment, Sergeant Cerullo, other officers and canine unit dogs moved into the basement, where they found three men hiding in a storage area. Sergeant Cerullo recognized one as the man he saw earlier at the rear porch of the building. Police arrested the three men.

Based on observations made during the "protective sweep," Lawrence Police sought and obtained a warrant to search 5A Royal Street. The defendants move to suppress the evidence seized during execution of the warrant.

RULINGS OF LAW

"Warrantless searches in a dwelling are presumptively unreasonable under art. 14 of the Declaration of Rights of the Massachusetts Constitution and the Fourth Amendment to the United States Constitution." Commonwealth v. Moore, 54 Mass. App. Ct. 344, 337-338 (2002). Where, as here, police make a warrantless entry and conduct a protective sweep of a home, the Commonwealth must show that the police had probable cause to believe that a crime had been or was being committed and that exigent circumstances justified immediate intervention. Commonwealth v. Peitrass, 392 Mass. 892, 897 (1984). The showing of exigency is particularly exacting when police enter and search a dwelling. The Commonwealth must demonstrate that it was impracticable for the police to obtain a warrant. Commonwealth v. Tyree, 455 Mass. 676, 684 (2010). In assessing the existence of exigent circumstances and the reasonableness of the police

[10] Police determined that this rear door was the one at which they had seen the Hispanic male minutes earlier.

response, "matters are to be evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis." Commonwealth v. Young, 382 Mass. 448, 456 (1981).

Warrantless entry into a residence is also permissible when police confront a dangerous situation threatening to life or safety and requiring immediate action. To fit within the "emergency aid" exception to the warrant requirement, the Commonwealth must demonstrate the existence of objectively reasonable grounds to believe that a "pure emergency" existed and that the conduct of police following entry was reasonable under the circumstances. See Commonwealth v. Peters, 453 Mass. 818, 819 (2009).

In the present case, the Commonwealth argues that police at the scene had probable cause to believe that a home invasion and potential "hostage situation" were underway and that exigent circumstances justified an immediate warrantless entry. Alternatively, the Commonwealth contends that the police were faced with a "emergency" creating an objectively reasonable belief that immediate entry was necessary to aid or protect persons inside or themselves from serious harm.

1. Probable cause and exigent circumstances

Probable cause to arrest exists where the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense. Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992). Probable cause to search exists where there is a substantial basis for a belief that there is a nexus between evidence of criminal activity, a place or person to be searched and a particular item to be seized. "In dealing with probable cause . . . we deal with probabilities. These are not technical;

they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Commonwealth v. Hanson, 387 Mass. 169, 174 (1982), quoting Brinegar v. United States, 338 U.S. 160, 175(1949). Accordingly, "an objective test is used to determine whether probable cause exists." Commonwealth v. Franco, 419 Mass. 635, 639 (1995).

Here, the Commonwealth argues that the officers had probable cause to believe that they had responded to a home invasion and a potential hostage situation. This determination was based on the following facts: the 911 caller's report that one of the men she saw outside was armed and that she had heard him "rack" a gun before entering the building; Sergeant Cerullo's observation at the rear of the building that a man who he believed fit the caller's description quickly retreated back into the building after seeing the officers; and Lawrence police officers' knowledge of a "rash" of home invasions in and around their city. Without doubt, it was appropriate for police to respond to the scene and to assess the circumstances. What the court must determine is whether the totality of those and other circumstances supported a warrantless entry of the apartment 5A.

The probable cause inquiry begins with the 911 caller's information, and whether it met the veracity/reliability and basis of knowledge prongs of the Aguilar/Spinelli analysis. Even though she remained unnamed, the caller's reliability is afforded greater weight than that of an anonymous informant as the 911 call was recorded, police had the ability to trace the caller back to her telephone number, and Sergeant Simard succeeded in reaching and speaking with her. See Commonwealth v. Costa, 448 Mass. 510, 516-517 (2007). See generally, Commonwealth v. Samuel, 80 Mass. App. Ct. 560, 563 (2011) (911 caller identified himself, provided officers with his address and telephone number in the event that the officers needed to call him back). The caller had identified her address as 21 Royal Street. She reported her first-hand observations,

made shortly before her 911 call, of the activities of the Hispanic men outside of the Royal Street residence and that she heard what she claimed to recognize as a gun being "racked." During that call, Sergeant Simard determined that she lived nearly and had an angular view from her residence to 5-7 Royal Street.[11]

However, the 911 caller's report that she heard one of the men "rack" a gun before entering the building, without more, does not support a finding that probable cause existed to believe that the men she saw had committed or were committing a crime.

It is well established that possession of a firearm, without more, is insufficient to create a reasonable belief that a crime is or will be committed because, in Massachusetts, a properly licensed person may lawfully carry a handgun. Commonwealth v. Alvarado, 423 Mass. 266, 269-274 (1996); See also Commonwealth v. Couture, 407 Mass. 178, 181 (1990)("A police officer's knowledge that an individual is carrying a handgun, in and of itself, does not furnish probable cause that the individual is illegally carrying the gun"). Illustrative of this point is Commonwealth v. Samuel, supra, where the court upheld a warrantless entry into an apartment based on a 911 report of an armed individual at the residence. There, the caller *also* reported that the defendant had displayed his firearm to a room full of people, stated that he had been hired to kill someone, and placed the weapon underneath a pillow. Id., 80 Mass. App. Ct at 563.

In this case, the 911 caller initially reported that before two "Spanish" men (dressed in a black jacket and in a gray jacket) entered the building she heard one of them "rack" a gun. When police arrived at 5-7 Royal Street and found nothing untoward, they surrounded the building to secure the scene as they investigated. In an effort at clarification, the dispatcher traced the 911

[11] She reported that she made her observations of the three men outside while walking outside her residence

caller's phone number, which Sergeant Simard re-dialed in order to contact the caller. While speaking with her, Sergeant Simard learned that she saw three (and not two) men whom she did not recognize on the front step of the building; but she also indicated that she was new to the area. She said that she heard the sound of a semi-automatic gun "racking." She also told Sergeant Simard that, based on their "easy" entry, she suspected one of the men had a key. She acknowledged that she was located (and lived) across and at an angle from 5-7 Royal Street, from where she seemed to be observing the police activities. However, unlike in Samuel where police officers corroborated all of the 911 caller's information, here, the only significant corroboration was Sergeant Cerullo's observation of an Hispanic male (who he believed fit the description provided by the dispatcher[12]) quickly walk out the rear door, then retreat into the building and lock the door after hearing Sergeant Cerullo identify himself as a police officer. Police officers at the scene neither saw nor heard anything indicative of a forced entry to the building or any apartment, property damage or a struggle. They had no information about the occupants of apartment 5A and nothing that indicated that the men who entered 5-7 Royal Street did not reside there. Police did not receive or learn any information as would lead one to reasonably believe that there were injured or endangered persons or hostages inside apartment 5A. There was no evidence of cries, loud voices or arguing in the apartment. Upon questioning the residents in the first floor apartment of 7 Royal Street, Sergeant Simard learned that they had not heard any noise coming from within

[12] It bears noting the caller and dispatcher provided very general descriptions of two Hispanic men - one wearing a gray jacket and one wearing a black jacket - and did not describe either as wearing a grey and black sweater.

it.[13] There was noting indicative of an imminent threat of danger to persons inside the building or to the officers.

Furthermore, the caller told Sergeant Simard that she observed the men talking calmly before entering the building and, again, given the ease with which they gained entry, she believed that one of the men had a key. While the latter observations concerning the group's demeanor and the ease in which they entered did not obviate the need for further police inquiry or investigation, when viewed in its entirety, the caller's statements provided little, if any, support for the officers' belief that they were confronting a home invasion or a "hostage situation."

Viewed objectively, the facts and circumstances confronting the officers were insufficient to establish probable cause to believe that they were facing a home invasion, hostage situation or injured or endangered persons inside, or that the lives of the officers or others might be endangered in the absence of immediate entry.

By contrast, in Commonwealth v. Paniaqua, 413 Mass. 796, 798 (1992), police officers responded to a report of shots fired in an apartment building. Upon arrival, a resident of the building reported that the defendant had fired shots directed toward his apartment. Id. As the officers approached the apartment a man opened the rear door of the apartment, looked out, and closed the door. Id. He then opened the front door and asked the officers "what they wanted." When asked about the shooting, the man claimed he had no knowledge of shots being fired. Id. At that time, one of the officers entered the apartment and witnessed the defendant running toward the kitchen while carrying a gun. Id. The Supreme Judicial Court held that the circumstances

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[13] It bears noting that neither Sergeant Cerullo nor Sergeant Simard provided any explanation as to why they ultimately focused their attention on apartment 5A on the first floor.

warranted the officers belief that immediate entry was needed in light of the danger to the public and that an individual with a gun was inside. Id. In contrast, in this case the Commonwealth has not shown that probable cause existed to believe a crime was being committed and or that police had a reasonable basis to believe that persons inside apartment 5A were injured or in danger and that any delay would further exacerbate an already volatile situation.

Because the Commonwealth has not established the existence of probable cause to believe that anyone inside apartment 5A had committed or was committing a crime and the existence of an exigency that justified immediate entry and intervention, the exigent circumstances exception to the warrant requirement does not apply.

2. "Emergency Aid"

The Commonwealth also argues that the emergency aid exception justified the warrantless entry. Pursuant to that doctrine, police may enter a home without a warrant when they have an objectively reasonable basis to believe that there may be someone inside who is injured, in immediate need of assistance or in imminent danger of physical harm. It "applies when the purpose of the police entry is not to gather evidence of criminal activity but rather, because of an emergency, to respond to an immediate need for assistance for the protection of life and property." Commonwealth v. Bates. 28 Mass. App. Ct. 217, 219-220 (1990). "[W]here the entry is effected solely to avert a dangerous situation that threatens life or safety and not for criminal investigative purposes, probable cause is not required under either the Fourth Amendment to the United States Constitution or art. 14 of the Declaration of Rights of the Massachusetts Constitution." Commonwealth v. Ringgard, 71 Mass. App. Ct. 197, 202 (2008).

"To fit within the emergency aid exception, a warrantless entry and protective sweep must meet two strict requirements. First, there must be objectively reasonable grounds to believe that an emergency exists. . . . Second, the conduct of the police following the entry must be reasonable under the circumstances, which means that the protective sweep must be limited in scope to its purpose - a search for victims or suspects." Peters, 453 Mass. at 823. Therefore, to justify warrantless entry of a residence under this doctrine, "the Commonwealth has the burden of showing . . . that 'the authorities had reasonable ground to believe than an exigency existed, and . . . [that] the actions . . . were reasonable under the circumstances.'" Commonwealth v. Morrison, 429 Mass. 511, 515 (1999), quoting from Commonwealth v. Marchione, 384 Mass. 8, 10-11 (1981).

In this case, there appears to be no serious issue as to the second requirement; the credible evidence showed that the police conducted only a limited protective sweep of apartment 5A. At issue is whether the Commonwealth has met its burden of showing that the Lawrence police officers had objectively reasonable grounds for believing that an emergency requiring immediate response existed.

Here, the Commonwealth introduced no evidence that the police were aware of any prior acts or threats of violence associated with apartment 5A. Compare Commonwealth v. Snell, 428 Mass. 766, 773 (1999) (police aware of defendant's release on bail after his arrest for threatening to murder victim and burn down marital home). They were not responding to any expressions of concern by, for instance family members or friends, for the well-being of anyone residing in or visiting the apartment. See e.g. Id. at 768-769; Commonwealth v. Entwistle, 463 Mass. 205, 215-219. At the scene, they neither heard, saw nor obtained information of any cries for help, of

persons with injuries or in danger, or of any violence within the apartment. Without question, the 911 call warranted police investigation. See generally, Commonwealth v. Foster, 48 Mass. App. Ct. 671, 673 (2000). However, the additional information police learned at the scene did not rise to the level of reasonable grounds to believe that an emergency that required immediate assistance justifying warrantless entry existed.

The Commonwealth's claim that the officers had reason for concern that an armed man was present in the apartment building is not completely without merit. When the officers secured the building, Sergeant Cerullo witnessed a man who generally fit the 911 caller's description leaving through the rear door and then retreat back into the apartment when he saw the officers approaching. However, the officers' subjective - even good faith - belief is not the proper measure of whether objectively reasonable grounds existed for a warrantless entry. Commonwealth v. DiGeronimo, 38 Mass. App. Ct. 714, 724-725 (1995). For the emergency aid exception to apply, "the injury sought to be avoided must be immediate and serious, and the mere existence of a potentially harmful circumstance is not sufficient." Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 841-842 (2006). Here, considering all of the circumstances present at the time of the entry, the officers did not have an objectively reasonable basis for believing that persons inside might be severely injured or in imminent danger of physical harm and, therefore, required immediate assistance. See Commonwealth v. Hall, 366 Mass. 790 (1975) (whether the officers had an objectively reasonable belief based on the totality of the circumstances).

CONCLUSION

The Commonwealth has not met its burden of showing that the warrantless entry to apartment 5A was justified on the basis of probable cause and exigent circumstances or the

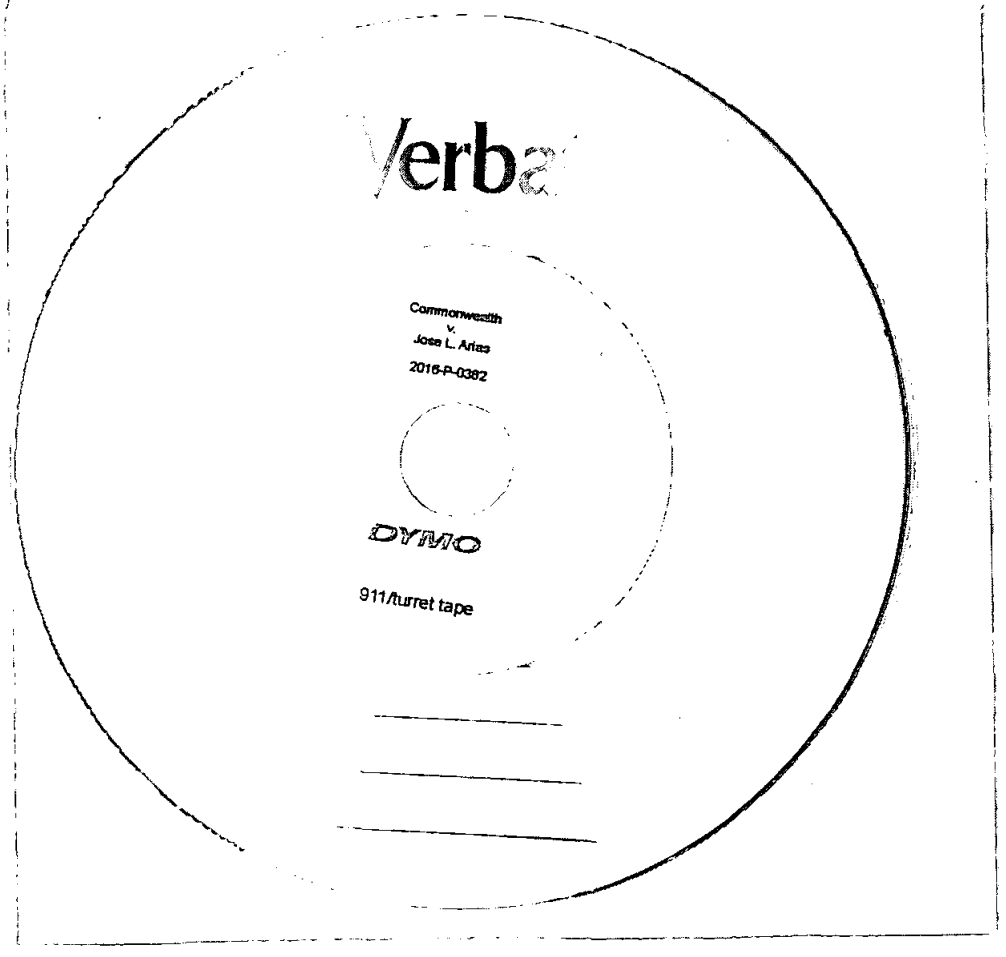
emergency aid exception to the warrant requirement. Accordingly, any evidence seized pursuant to the search warrant that was based solely on information acquired during that initial warrantless entry must be suppressed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants' motions to suppress evidence seized pursuant to the search warrant are **ALLOWED**.

Mary-Lou Rup
Associate Justice of the Superior Court

Dated: December 3, 2015


Verba
Commonwealth
v.
Jose L. Arias
2016-P-0382
DYMO
911/turret tape

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2016-P-0362

COMMONWEALTH,
Appellant

V.

JOSE L. ARIAS,
Appellee

ON INTERLOCUTORY APPEAL FROM AN ORDER
OF THE ESSEX SUPERIOR COURT

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH

ESSEX, SS.
